IN THE

Supreme Court of the United States

October Term 1978

No. 78-1487

FORD MOTOR CREDIT COMPANY and DEE THOMASON FORD,

Petitioners,

vs.

DENNIS MILHOLLIN AND MICHELLE MILHOLLIN,

Respondents.

FORD MOTOR CREDIT COMPANY,

Petitioner,

vs.

DONNA M. EATON,

Respondent.

(Caption continued on inside cover)

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petitioners,

vs.

DARRELL MESSINGER,

Respondent.

FORD MOTOR CREDIT COMPANY and WEBSTER WOLFARD FORD, INC.,

Petitioners,

vs.

DAVID P. ANDRESEN,

Respondent.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners, Ford Motor Credit Company (hereinafter "Ford Credit"), Dee Thomason Ford, Marv Tonkin Ford Sales, Inc. and Webster-Wolfard Ford, Inc., respectfully pray that a writ of certiorari issue to review

the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on December 28, 1978.

Opinions Below.

The opinion of the Court of Appeals (App. A at 1a-12a) is reported at 588 F.2d 753. The opinions, orders, and judgments of the District Court (App. B at 13a-39a) are not reported.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered on December 28, 1978. This petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented.

1. Whether the existence of a right to accelerate an indebtedness upon default must be disclosed as a default, delinquency or similar charge pursuant to Section 128(a)(9) of the Truth in Lending Act and Section 226.8(b)(4) of Regulation Z promulgated by the Federal Reserve Board.

2. Whether the exercise of a right to accelerate an indebtedness upon default constitutes a "prepayment" under Section 226.8(b)(7) of Regulation Z.

3. Whether the creditor's rebate agreement applicable to payment of an indebtedness after acceleration must be separately disclosed under Section 226.8(b)(7) of Regulation Z where the creditor's rebate disclosure applicable to prepayment applies to payment both before and after acceleration.

Statutory Provisions and Regulations Involved.

Truth in Lending Act § 128(a)(9), 15 U.S.C. § 1638(a)(9):

"(a) In connection with each consumer credit sale not under an open end credit plan, the creditor shall disclose each of the following items which is applicable:

. . .

(9) The default, delinquency, or similar charges payable in the event of late payments."

Regulation Z, 12 C.F.R. § 226.8(b)(4):

"(b) In any transaction subject to this section, the following items, as applicable, shall be disclosed:

. . .

(4) The amount, or method of computing the amount, of any default, delinquency, or similar charges payable in the event of late payments."

Regulation Z, 12 C.F.R. § 226.8(b)(7):

"(b) In any transaction subject to this section, the following items, as applicable, shall be disclosed:

. . .

(7) Identification of the method of computing any unearned portion of the finance charge in the event of prepayment in full of an obligation which includes precomputed finance charges and a statement of the amount or method of computation of any charge that may be deducted from the amount of any rebate of such unearned finance charge that will be credited to the obligation or refunded to the customer. If the credit contract

does not provide for any rebate of unearned finance charges upon prepayment in full, this fact shall be disclosed."

Statement of the Case.

This proceeding involves four separate actions brought by respondents in the United States District Court for the District of Oregon for damages under the Federal Truth in Lending Act (herein the "Act"). Jurisdiction of the District Court was based on Section 130(e) of the Act [15 U.S.C. § 1640(e)].

In each of these cases, the respondent purchased an automobile from a dealer (one of the petitioners other than Ford Credit) on an installment basis. As a part of the transaction, the respondent signed an installment sale contract in favor of the dealer. In each case, the contract was subsequently assigned by the dealer to Ford Credit.

The installment sale contracts signed by the respondents consisted of single-page printed forms that were prepared specifically for use in connection with installment sales of automobiles subject to the Truth in Lending Act. The terms and conditions of the sale were contained on both sides of the page. Consistent with Section 226.8(a) of Regulation Z, which requires all disclosures to be made on the same side of a single page, the front side of the form also served as the "federal disclosure statement" required under the Act. In three of the cases, the same form of contract was used. The form signed by the respondent in the fourth case differed only in certain minor respects.

Paragraph 14 on the front side of each of the contracts contained the following provision dealing with the purchaser's right to a rebate of unearned finance charges in the event of a prepayment of the obligation:

> "(14) Prepayment Rebate: Buyer may prepay his obligations under this contract in full at any time prior to maturity of the final installment hereunder, and, if he does so, shall receive a rebate of the unearned portion of the Finance Charge computed under the sum of the digits method after first deducting an acquisition fee of $15.00. No rebate will be made if the amount is less than $1.00."

Paragraph 19, set forth on the reverse side of each of the contracts, contained an acceleration clause that permitted Ford Credit to declare all unpaid installments to be immediately due and payable in the event of a default by the purchaser. In part, that paragraph provided that:

> "19. DEFAULT
>
> Time is of the essence of this contract. In the event Buyer defaults in any payment . . . , or fails to comply with any other provision hereof . . . , Seller shall have the right to declare all amounts due or to become due hereunder to be immediately due and payable. . . ."

Upon full payment of the indebtedness following acceleration, paragraph 14 of the contract, quoted above, requires a rebate of unearned finance charges. In accordance with this provision, Ford Credit's practice is to rebate unearned finance charges upon payment of the indebtedness after acceleration in all cases.[1]

The respondents alleged that the installment sale contracts did not comply with the requirements of the Truth in Lending Act and Regulation Z. Among the

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[1]*See, e.g., Eaton v. Ford Motor Credit Co.,* Record at 182. *See also* note 5, *infra.*

violations alleged by the respondents was that the acceleration clause was not disclosed on the face of the contracts. Relying upon its earlier opinion in *Woods v. Beneficial Finance Co.*, 395 F. Supp. 9 (D. Or. 1975), the District Court ruled in favor of the respondents, holding that the Act imposes a "duty to disclose and fully explain any right of acceleration." (App. B at 17a)[3].

On appeal to the United States Court of Appeals for the Ninth Circuit, the four cases were consolidated. Solely upon the basis of its earlier decision in *St. Germain v. Bank of Hawaii*, 573 F.2d 572 (9th Cir. 1977) (App. C at 40a-51a), the Ninth Circuit upheld the District Court's conclusion that the acceleration clause must be disclosed. The decision in *St. Germain*, which conflicts with the position of the Federal Reserve Board and decisions by five other Circuit Courts, was premised upon the Court's novel and unprecedented determination that the act of accelerating and indebtedness constitutes a "prepayment" that must be disclosed under Section 226.8(b)(7) of Regulation Z. The Ninth Circuit's decision in these cases is in direct and clear conflict with the decisions of five other Circuits—the Third, Fifth, Eighth, Tenth and District of Columbia—on issues identical to the issues in this case. While there are substantial differences in the rationales employed by the other Circuits, the Ninth Circuit stands alone in the result achieved under the facts in this case. In reaching its result, the Ninth Circuit has failed

[3]The District Court ruled in favor of the respondents on the acceleration issue in the *Milhollin* and *Eaton* cases. In *Messinger* and *Andresen*, the District Court found other violations and did not reach the acceleration issue. See *Milhollin v. Ford Motor Credit Co.*, 588 F.2d 753, 757-59 (9th Cir. 1978).

to follow a clear interpretation of the Federal Reserve Board which has been charged by Congress with the primary responsibility for interpreting and applying the Truth in Lending Act.

The decision in these cases reflects present uncertainty and generates more uncertainty in an important area of the national economy where certainty and predictability are essential to maintain the free flow of credit. If allowed to stand, it places in jeopardy millions of consumer credit transactions entered into in good faith reliance upon the interpretations of the Federal Reserve Board and the decisions of the other Circuits. This Court must step in to bring some order out of what can only be described as chaos in the lower federal courts.

REASONS FOR GRANTING THE WRIT.

I.
Introduction.

There are an estimated 60,000,000 consumer credit contracts outstanding in the United States today representing more than $265,000,000,000 in total consumer installment indebtedness.[3] Although these installment contracts vary significantly in their credit terms, they all contain one clause in common: an acceleration clause.[4] The acceleration clause provides that upon the debtor's default, the creditor may accelerate the maturity of all remaining installments.

All of these consumer credit contracts are subject to the Truth in Lending Act [15 U.S.C. §§ 1601 *et seq.*] (herein the "Act") and Regulation Z [12 C.F.R. § 226] promulgated by the Federal Reserve Board (herein the "Board"). The stated purpose of the Act is "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him

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[3]According to the Federal Reserve Board, total consumer installment indebtedness outstanding in the United States during November of 1978 was $269,445,000,000. 65 *Federal Reserve Bulletin* A42 (Table 1.55) (1979). Although no exact figures are available with respect to the total number of individual transactions that comprise this total, the amount of the average transaction appears to be less than $4,000. *See Finance Facts Yearbook 1977*, pp. 46-47 (published by the Consumer Credit Education Foundation, Library of Congress Catalog Card No. 61-14409). Based on this average, the estimate of 60,000,000 separate transactions is probably conservative.

[4]*See Johnson v. McCrackin-Sturman Ford, Inc.*, 527 F.2d 257, 264 (3d Cir. 1975); II *G. Gilmore, Security Interests in Personal Property* 1195 (1965) ("For a hundred years, it may be, no security agreement has failed to include an acceleration clause.").

and avoid the uninformed use of credit." Truth in Lending Act § 102(a) [15 U.S.C. § 1601(a)]. The Act and the Regulation seek to achieve this goal by requiring uniform statements of credit terms to be given to consumers.

In an effort to promote uniformity, the Act and Regulation Z describe with particularity the various disclosures that are required to be made, in some cases even dictating the precise terminology that must be used. *See, e.g.*, Regulation Z §§ 226.8(b)(2), 226.8(b)(3), 226.8(c) and 226.8(d). Although specific numerical and descriptive disclosures are prescribed, neither the Act nor the Regulation require disclosure of the existence of an acceleration clause.

The Federal Reserve Board, which was charged by Congress with the responsibility for interpreting the Act, has confirmed that the existence of an acceleration clause need not be disclosed. The Board has ruled, however, that where an indebtedness is paid in full after acceleration and the consumer is not credited with the same rebate of unearned finance charges that would have been made in the event that the indebtedness had been voluntarily prepaid in full prior to acceleration, the extra charge must be disclosed to the consumer as a default charge under Section 226.8(b)(4) of Regulation Z. Ford Credit *does not* charge a consumer a greater amount to pay the indebtedness in full after acceleration than he would have been required to pay had the indebtedness been prepaid in full prior to acceleration. In accordance with the prepayment provisions of its disclosure statements, Ford Credit's policy is to rebate unearned finance charges upon payment in full following acceleration

in the same manner in which it would rebate upon a voluntary prepayment in full.[5]

During the past forty months, the United States Courts of Appeal for six different Circuits have examined the application of the Act and Regulation Z to acceleration clauses in consumer credit contracts. Despite the clarity of the Board's position, none of the Circuits have adopted that position in total. The Board's position has been rejected by the Ninth and Tenth Circuits, partially rejected by the Fifth Circuit, and partially followed by the Third, Fifth and District of Columbia Circuits. The Ninth Circuit has rejected decisions by the Third, Fifth and Tenth Circuits; the Eighth Circuit has rejected the approach of both the Ninth and the Fifth Circuits; the Tenth Circuit has rejected the views of the Third Circuit; and the Fifth Circuit has issued six separate, internally conflicting opinions.

The conflicting and confusing positions that the Circuits have taken on the acceleration issue prompted one Court to aptly observe in frustration that "the Circuits are in disarray." *St. Germain v. Bank of Hawaii,* 573 F.2d 572, 573 (9th Cir. 1977).

This conflict and confusion among the Circuits and the Board has an enormous, adverse impact upon the consumer credit industry. As noted above, all consumer credit contracts contain an acceleration clause. Creditors

[5] *See* note 1, *supra.* In *Griffith v. Superior Ford,* 577 F.2d 455 (8th Cir. 1978), a case involving a similar Ford Credit form of contract and Ford Credit's identical policy with respect to rebating unearned finance charges upon payment following acceleration, the Eighth Circuit noted: "It is undisputed that the creditor's policy in this case is to rebate upon prepayment after acceleration in accordance with the rebate method shown on the disclosure statement." 577 F.2d at 460 n.6.

making a conscientious and good faith effort to comply with the Act and Regulation Z are left with no clear guidelines as to what disclosures are required and face enormous civil penalties if they guess wrong. Because of the conflicting Circuit Court decisions, a consumer installment contract that complies with the Act and Regulation Z in one jurisdiction may be in violation when used in other jurisdictions. Unless this Court intervenes, the consumer credit industry will continue to be plagued with needless and costly uncertainty, lack of uniformity and hopeless confusion.

II.

The Decision Below Is in Conflict With Interpretations of the Federal Reserve Board and the Decisions of the Third, Fifth, Eighth, Tenth and District of Columbia Circuits.

A. Introductory Summary of the Conflicting Board and Circuit Court Positions.

Section 128(a)(9) of the Act and Section 226.8 (b)(4) of Regulation Z deal with default charges and both require a creditor to disclose any "default, delinquency, or similar charges payable in the event of late payments." Section 226.8(b)(7) of Regulation Z, which has no counterpart in the Act, focuses upon the prepayment of a consumer credit contract in which finance charges have been precomputed and added to the contract balance. Simply stated, Section 226.8 (b)(7) requires the disclosure of the method by which any unearned portion of the finance charge will be rebated to the consumer when the contract is prepaid in full. These two provisions constitute the basis of all of the claims litigated in the lower courts which assert that the existence of an acceleration clause in

a consumer credit contract gives rise to additional disclosure requirements under the Truth in Lending Act.

The Federal Reserve Board has taken the position that the mere existence of an acceleration clause in a contract does not of itself result in a charge under Section 128(a)(9) of the Act or Section 226.8(b)(4) of Regulation Z. The Board has taken the position, however, that an acceleration clause can result in a "charge" under these sections if upon payment in full following acceleration the creditor does not rebate the unearned finance charge by a method at least as favorable to the consumer as the method disclosed for rebating finance charges in the event of a voluntary prepayment in full. This view appears to be followed by the most recent decisions in the Fifth Circuit. *See McDaniel v. Fulton National Bank,* 571 F.2d 948 (5th Cir.) (*en banc*), *reh. denied,* 576 F.2d 1156 (5th Cir. 1978) (*en banc*); *Kennedy v. Plaza Pontiac, Inc.,* 589 F.2d 161 (5th Cir. 1979). Applying this view to the facts in the instant case, Ford Credit's contract would not violate the Truth in Lending Act since Ford Credit rebates unearned finance charges in the event of a prepayment in full following acceleration in the same manner in which it rebates unearned finance charges in the event of a voluntary prepayment. The method of calculating the rebate upon any prepayment, whether voluntary or involuntary, is disclosed to the consumer in accordance with the requirements of Section 226.8(b)(7) of Regulation Z at paragraph (14) of the disclosure statement on the face of Ford Credit's contract form.

The Third Circuit in *Johnson v. McCrackin-Sturman Ford, Inc.,* 527 F.2d 257 (3d Cir. 1975) and the

District of Columbia Circuit in *Price v. Franklin Investment Co., Inc.,* 574 F.2d 594 (D.C. Cir. 1978) have taken a similar view, at least where the creditor is required by state law to rebate unearned finance charges.[6] Thus, under the approach taken by the Third Circuit and the District of Columbia Circuit, Ford Credit's contract and policies with respect to rebating unearned finance charges in the event of prepayment following acceleration would not result in a violation of the Truth in Lending Act.

Some Circuits have rejected the view of the Federal Reserve Board and taken the position that *under no circumstances* does the existence of an acceleration clause in a contract give rise to any disclosure requirements under the Truth in Lending Act. This was the position originally taken by the Fifth Circuit in *Martin v. Commercial Securities Co.,* 539 F.2d 521 (5th Cir. 1976):

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[6]Ford Credit's contract even comports with this narrower interpretation since Oregon law requires a rebate of unearned finance charges if the customer prepays his account in full subsequent to acceleration. O.R.S., Section 83.620(1) provides:

> "Notwithstanding the provisions of a retail instalment contract to the contrary, the buyer may pay in full at any time before maturity the obligation contained in the retail instalment contract. Upon such premature payment, the buyer shall receive a refund credit."

Although the caption to this section is "Voluntary prepayment by buyer—refund", the statute can not logically be construed to permit a creditor to cut off the buyer's right to a prepayment rebate by the act of acceleration. As noted by the U.S. Court of Appeals for the Eighth Circuit in *Griffith v. Superior Ford,* 577 F.2d 455, 460 n.7 (8th Cir. 1978) the reference to "maturity" both in the statute and in the disclosure statement "could have reference only to the stated maturity of the unpaid installment" and not to maturity resulting from acceleration. Moreover, the caption to Section 83.620(1) was not a part of the legislative enactment, but was added by the legislative counsel who prepares the statutes for publication. *See* Or. L. 1977, ch. 692, § 1; Or. L. 1957, ch. 625, § 24.

"Affording the substantial weight to the Solomon letter that *Philbeck v. Timmers Chevrolet, Inc.* [499 F.2d 971 (5th Cir. 1974)], mandates, we nevertheless can not accept the staff's interpretation of the requirements of sections 226.8(b)(4) and 226.8(b)(7). With deference, we find its one-sentence conclusion that an acceleration of payments is essentially a prepayment of the contract obligation to be an analytical construction of regulatory intent which has not been expressed in language that 'all who run may read.' In the installment credit context prepayment and acceleration appear to be conceptually antithetical. The former is the unilateral act of the debtor; the latter the unilateral act of the creditor in the typical installment contract.

In summary, while we recognize that one who applies for installment credit may be as concerned about the lender's rebate policy with respect to unearned finance charges in the event of acceleration as he is with such policy upon prepayment, we leave it to the Board to make explicit what Mr. Solomon finds implicit in a regulation which has provoked so much disagreement in conscientious trial courts.

We hold that in the absence of a regulation requiring it, failure to disclose an acceleration clause and the lender's rebate policy with respect thereto in an installment credit transaction does not give rise to a claim for statutory damages." 539 F.2d at 529 [footnotes omitted].[7]

[7]The *Martin* decision was subsequently overruled in part by the Fifth Circuit in *McDaniel v. Fulton National Bank*, 571 F.2d 948 (5th Cir. 1978).

This approach has been followed by the Tenth Circuit in *Begay v. Ziems Motor Co.*, 550 F.2d 1244 (10th Cir. 1977):

> "We are persuaded that the view taken by the Fifth Circuit in *Martin v. Commercial Securities Co., Inc.*, supra, is the proper one on the merits of the question before us. Such an acceleration provision is a universal one, as *Johnson v. McCrackin-Sturman Ford, Inc.*, points out, supra, 527 F.2d at 264. The Federal Reserve Board has issued no regulation on the problem, despite the rather extensive litigation on the question. In these circumstances we are of the view that there is no additional 'charge' in the acceleration provision. . . .
>
> . . . We agree with the *Martin* opinion that the letter [Public Information Letter No. 851, *infra*] is not persuasive and that we should leave it to the Board to make such a disclosure requirement explicit by regulation." 550 F.2d at 1248-49.

Similarly, in *Griffith v. Superior Ford*, 577 F.2d 455 (8th Cir. 1978), in a case involving a similar Ford Credit form of contract and Ford Credit's identical rebate policy upon acceleration, the Eighth Circuit held:

> "Defendants' disclosure statement fully complies with the Act and Regulation Z in describing the method of rebate in the event of prepayment. Regulation Z, fairly read, requires only the disclosure of the consequences of *prepayment*, not the effect of the exercise of a right to accelerate. In our judgment, no such additional disclosure

> requirement is either explicit or implicit in the language of the Regulation. To the extent the absence of such a disclosure requirement may be perceived by the courts as a hole in the regulatory matrix, only the Federal Reserve Board is authorized to fill the hole. It is for the Board itself, not the courts, to assess the potential impact of the exercise of the right of acceleration upon the credit customer and on the basis thereof to determine whether to explicitly expand the existing disclosure requirements. We are unwilling to usurp the prerogatives of the Board." 577 F.2d at 460 (emphasis in original).

Under the law expressed by the Eighth and Tenth Circuits and as originally expressed by the Fifth Circuit, in the cases cited above, Ford Credit's form of contract and policy with respect to rebating unearned finance charges upon payment in full following acceleration clearly do not give rise to a violation of the Truth in Lending Act.

The Ninth Circuit's approach is in direct conflict with the approach taken by the Federal Reserve Board and the Third, Fifth, Eighth, Tenth and District of Columbia Circuits. The Ninth Circuit held that the existence of an acceleration clause and a creditor's rebate policy upon acceleration must be disclosed notwithstanding the fact that the creditor rebates unearned finance charges upon payment in full following acceleration by the same method disclosed for prepayment in full.

B. Position of the Federal Reserve Board.

In a series of Public Information Letters and an Official Staff Interpretation, the Federal Reserve Board has consistently declared that an acceleration clause need not be disclosed under the Act or Regulation Z if the creditor rebates unearned finance charges upon payment of the indebtedness after acceleration in accordance with its disclosed method of rebating unearned finance charges upon voluntary prepayment.

1. *The Board's Position on Section 226.8(b)(4).* In its Official Staff Interpretation No. FC-0054 (App. D at 52a-56a), the Board specifically stated that a *right* of acceleration, in and of itself, is not a default, delinquency or similar charge under Section 226.8(b)(4). In the same Official Staff Interpretation, the Board also affirmed its earlier Public Information Letter No. 851 (App. E at 57a-58a) which stated that no disclosure is required under Section 226.8(b)(4) in connection with the exercise of the right of acceleration as long as the creditor rebates unearned finance charges to the consumer upon payment of the indebtednesss following acceleration:

> "Staff understands that letter [Public Information Letter No. 851] to say that early *payment* of the balance of a precomputed finance charge obligation by a customer upon acceleration by the creditor is essentially the same as a prepayment of the obligation. Therefore, if the creditor does not rebate unearned finance charges in accordance with the rebate provisions disclosed under § 226.8 (b)(7) when the customer pays the balance of the obligation upon acceleration, any amounts retained beyond those which would have been rebated under the disclosed rebate provisions do represent the type of charge that must be disclosed under § 226.8(b)(4)." App. D at 53a (emphasis in original).

Approximately three months after the issuance of Official Staff Interpretation No. FC-0054, the Board's position was reaffirmed and reiterated in Public Information Letter No. 1208 (App. F at 59a-60a). That letter stated that in determining whether the creditor's rebate method applicable to payment after acceleration is the same as the rebate method applicable to voluntary payment, the controlling factor "is whether in fact the creditor does or does not rebate upon prepayment after acceleration in accordance with the rebate method shown on the disclosure statement. In this sense, then, the individual creditor's policy determines whether there is a violation of the Act and regulation." *Accord,* Federal Reserve Board Public Information Letter No. 1324 (App. G at 61a-63a).

The Board's analysis of Section 226.8(b)(4) can be summarized as follows: if the creditor discloses a rebate provision relating to prepayment and actually rebates to the consumer unearned finance charges upon payment of the indebtedness after acceleration, neither the existence nor the exercise of the right of acceleration, nor payment after acceleration, will result in the imposition of any additional late payment "charge" upon the debtor. Ford Credit's contract and rebate policy clearly comply with this guideline.

2. *The Board's Position on Section 226.8(b)(7).* In its Official Staff Interpretation (No. FC-0054), the Board made it clear that it views a payment of the indebtedness following acceleration as tantamount to a "prepayment" of the obligation for purposes of Section 226.8(b)(7). As long as the creditor's rebate practice is the same for both voluntary prepayment and prepayment following acceleration, only one rebate disclosure is required by Section 226.8(b)(7). Ford Credit's rebate practice is the same for both voluntary prepayment

and prepayment following acceleration and this rebate practice is fully disclosed in Ford Credit's disclosure statement. Ford Credit's contract disclosures therefore comply with the Board's interpretation.

Despite the clarity of the Board's position concerning Sections 226.8(b)(4) and 226.8(b)(7), the Circuits have reached widely conflicting results concerning the disclosure requirements imposed by these Sections.

C. The Third Circuit.

The first Circuit Court to analyze the acceleration issue was the Third Circuit in *Johnson v. McCrackin-Sturman Ford, Inc.,* 527 F.2d 257 (3d Cir. 1975). In that case, the Court considered whether a creditor was required to disclose the existence of an acceleration clause where state law provided that the creditor must rebate unearned finance charges in the event of a payment after acceleration. The Court held that "when a creditor is required to rebate the unearned portion of the finance charge, his right of acceleration is not a 'default, delinquency or similar charge.'" 527 F.2d at 268.

Although the decision of the Third Circuit is consistent with the position of the Federal Reserve Board, the Court specifically declined to consider whether the result would be the same where the creditor is not required by state law to rebate the unearned finance charge upon payment after acceleration. *See* 527 F.2d at 260 n.3.[8]

[8]Contrary to the assertion of the Ninth Circuit in *St. Germain,* the Third Circuit did not hold "that retained interest is a 'charge,' the existence of which must be disclosed, unless, under state law, the retained interest must be rebated upon acceleration." *St. Germain v. Bank of Hawaii,* 573 F.2d 572, 575

(This footnote is continued on next page)

D. The Fifth Circuit.

The confusion rampant in the lower courts is reflected in the vacillation in approach taken in the Fifth Circuit. The Fifth Circuit has issued six separate opinions on the acceleration issue, including two opinions rendered by the Court *en banc*. The acceleration problem was first brought before the Fifth Circuit in *Martin v. Commercial Securities Co.*, 539 F.2d 521 (5th Cir. 1976). In that case, the Court held that no disclosures are ever required by reason of an acceleration clause in a consumer credit contract, even where the creditor makes no rebate of unearned finance charges upon payment in full after acceleration. The Court declined to follow the Board's Public Information Letter No. 851 and rejected the Third Circuit decision in *Johnson v. McCrackin-Sturman Ford, Inc.*, *supra.*

A few months later, in *McDaniel v. Fulton National Bank*, 543 F.2d 568 (5th Cir. 1976), another panel of the Fifth Circuit followed the decision in *Martin*, although intimating its displeasure with the holding in *Martin.* Approximately sixteen months later, the Fifth Circuit, sitting *en banc*, reversed the earlier decision in *McDaniel. McDaniel v. Fulton National Bank*, 571 F.2d 948 (5th Cir. 1978) (*en banc*). In this third opinion, the Court reasoned that when an indebtedness is paid in full after acceleration and the customer is not credited with the same rebate of un-

(9th Cir. 1977). Rather, the Third Circuit merely held that acceleration is not a "charge" if state law requires unearned interest to be rebated upon acceleration. The Court specifically reserved and kept open the issue as to whether or not it would be a charge even if state law did not require such a rebate. *Johnson v. McCrackin-Sturman Ford, Inc.*, 527 F.2d 257, 260 n.3 (3d Cir. 1975).

earned finance charges that would have been made in the event of a voluntary prepayment, the additional charge is in the nature of "default, delinquency, or similar charges payable in the event of late payments." The Court quoted extensively from Official Staff Interpretation No. FC-0054 and unequivocally approved the Board's position: "We adopt it as the rule of decision in these cases." 571 F.2d at 951.

In a fourth opinion denying a petition for a rehearing from the second *McDaniel* decision, the Fifth Circuit retracted its prior unconditional approval of the Board's interpretation. *McDaniel v. Fulton National Bank*, 576 F.2d 1156 (5th Cir. 1978) (*en banc*). The Court held that if the contract permits the creditor to collect unearned finance charges upon payment following acceleration, this contract right will be viewed as a default charge that must be disclosed under Section 226.8(b)(4) regardless of the creditor's actual practice in enforcing this contract right. In this respect, the fourth opinion is in direct conflict with the Board's Public Information Letter No. 1208.

In its most recent two pronouncements on the subject, however, the Fifth Circuit appears to have reverted to the position announced in the second *McDaniel* opinion. *See Kennedy v. Plaza Pontiac*, 589 F. 2d 161 (5th Cir. 1979).[9] *Accord, Burley v. Bastrop Loan Co.*, 590 F.2d 160 (5th Cir. 1979).

[9]In a footnote to the per curiam opinion in *Kennedy v. Plaza Pontiac*, the Court summed up the position of the Fifth Circuit:

> "Since our decision, the *Martin* rule has been modified by our court en banc to require disclosure of rebate provisions on acceleration where the creditor does not rebate unearned finance charges in accordance with disclosed provisions for rebate upon prepayment." 589 F.2d at 161 n.1.

E. The Tenth Circuit.

Prior to the Fifth Circuit's *en banc* decision in the second *McDaniel* opinion, the Tenth Circuit resolved the acceleration issue by following the Fifth Circuit decision in *Martin. Begay v. Ziems Motor Co.*, 550 F.2d 1244 (10th Cir. 1977). The Tenth Circuit thus holds that no disclosures are ever required with respect to an acceleration clause. The subsequent reversal by the Fifth Circuit of its opinion in *Martin* has now left the Tenth Circuit in conflict with both the Third Circuit and the Fifth Circuit. The Tenth Circuit recently reaffirmed its position in *United States v. One 1976 Chevrolet Station Wagon*, 585 F.2d 978 (10th Cir. 1978).

F. The District of Columbia Circuit.

The District of Columbia Circuit rendered its decision regarding the disclosure of acceleration clauses in *Price v. Franklin Investment Co.*, 574 F.2d 594 (D.C. Cir. 1978). The District of Columbia Circuit chose to follow the decision of the Third Circuit in *Johnson v. McCrackin-Sturman Ford, Inc., supra.*

G. The Eighth Circuit.

The Court of Appeals for the Eighth Circuit considered the acceleration issue in *Griffith v. Superior Ford*, 577 F.2d 455 (8th Cir. 1978). The Court surveyed and critiqued the conflicting Circuit Court decisions on the acceleration issue and specifically criticized both the logical and legal inconsistencies inherent in the approaches of the Ninth and Fifth Circuits. While noting that its decision, under the facts in that case, was consistent with both the approach taken by the Third Circuit in *Johnson v. McCrackin-Sturman Ford, Inc.* and the position of the Federal Reserve Board,

it adopted the position originally taken by the Fifth Circuit in *Martin* and by the Tenth Circuit in *Begay* that no disclosures are required by reason of an acceleration clause.

H. The Ninth Circuit.

The approach taken by the Ninth Circuit to the acceleration clause issue not only is in direct conflict with the decisions in the Third, Fifth, Eighth, Tenth and District of Columbia Circuits but is also erroneous. The Ninth Circuit faced the acceleration issue in *St. Germain v. Bank of Hawaii*, 573 F.2d 572 (9th Cir. 1977). There the Court expressly rejected the Third Circuit's decision in *Johnson*, the Fifth Circuit's ruling in *Martin*, and the Tenth Circuit's view expressed in *Begay*. The Court also criticized the Federal Reserve Board for issuing "conflicting signals." 573 F.2d at 573. Adopting what it called "the Board's alternative prepayment theory" (573 F.2d at 577), the Court claimed to have "cut a clean path through the thicket." 573 F.2d at 577. Unfortunately, the ambiguity and inconsistency in the Ninth Circuit's approach has resulted in even greater confusion. Essentially, the Ninth Circuit held that:

> (1) The Federal Reserve Board and other Circuits are in error to the extent that they require default charge disclosures under Section 226.8(b)(4) since that section is inapplicable to acceleration clauses;
>
> (2) The creditor's *act* of acceleration constitutes a "prepayment" within the meaning of Section 226.8(b)(7) of Regulation Z;
>
> (3) The creditor must therefore disclose whether, and if so the manner in which, unearned

finance charges will be rebated upon the creditor's exercise of its right of acceleration;

(4) The creditor's disclosure with respect to voluntary prepayment will not suffice to satisfy this requirement; and

(5) The creditor must disclose the existence of the acceleration clause.

The Ninth Circuit's novel and unprecedented decision relying upon Section 226.8(b)(7) came as a complete surprise to the consumer credit industry. The Court's theory produces two analytic anomalies: First, the Court equated the acceleration of an indebtedness with "prepayment" of the indebtedness. Clearly, the acceleration of an indebtedness is not a payment of any kind, let alone a "prepayment." As the Fifth Circuit noted in *Martin*, "prepayment and acceleration appear to be conceptually antithetical. The former is the unilateral act of the debtor; the latter the unilateral act of the creditor in the typical installment contract." *Martin v. Commercial Securities Co.*, 539 F.2d 521, 529 (5th Cir. 1976). Second, although the Court stated that it could "perceive no serious textual impediment to reading Section 226.8(b)(7) prepayment to include involuntary prepayment (acceleration) as well as voluntary prepayment" (573 F.2d at 576), the Court, with complete and totally unexplained inconsistency, perceived that the creditor's disclosure of its method of rebate upon "prepayment" did not apply to prepayment following an acceleration. This inconsistency was criticized by the Eighth Circuit in the *Griffith* case:

"*St. Germain v. Bank of Hawaii, supra,* mandates disclosure of whether and how a rebate of unearned interest will be made by equating

acceleration with prepayment (the concept advanced in Federal Reserve Board staff pronouncements), although acknowledging that 'the prepayment concept is not without its own problems.' 573 F.2d at 576. One such problem is that if acceleration and prepayment are equivalents, then the creditor's disclosure respecting rebate upon *prepayment* would comply with the *only* express requirement of § 226.8(b)(7) of Regulation Z . . . ." *Griffith v. Superior Ford*, 577 F.2d 455, 459 (8th Cir. 1978) (emphasis in original; footnote omitted).

The decision of the Ninth Circuit in *St. Germain* was followed by the Ninth Circuit in the decision below without further clarification or analysis.[10]

The Ninth Circuit opinion in *St. Germain* is not only in conflict with the position of the Board and the other Circuit Courts, it is plainly wrong. All that the statute and Regulation require is that default, delinquency and similar charges be disclosed and that the creditor's method of calculating a rebate upon prepayment in full be disclosed. Ford Credit's disclosures in these cases fully comply with both of these requirements. A lender's rebate policy upon payment after acceleration is clearly not a "charge" if it does not enable the creditor to retain unearned finance charges. Ford Credit's contract and disclosures in these cases clearly provide for a rebate of any unearned finance charges upon prepayment, and this includes any prepayment resulting from an acceleration of the contract. In accordance with its contract and disclosure,

[10]The parties in *St. Germain* did not petition for a writ of certiorari.

Ford Credit's practice is to rebate unearned finance charges upon payment after acceleration.

In a companion case to *St. Germain,* the Ninth Circuit in *Kessler v. Associates Financial Services Co.,* 573 F.2d 577 (9th Cir. 1977) affirmed that portion of a district court decision holding that an acceleration clause had not been properly disclosed, but reversed the district court's decision to apply its decision prospectively only. In its opinion in *Kessler,* the Court acknowledged the uncertainties caused by the conflicting interpretations of the Act and Regulation and the difficulties that presents to creditors attempting to draft disclosure forms:

> "We share the district court's concern that the vagaries of the construction of TILA and Regulation Z can be traps for even wary lenders and that the end product of requiring more and more revelations in disclosure statements can ultimately defeat the informative purposes that Congress had in mind because the disclosure statements will become as complex, unreadable, and often as unread as the underlying contracts. As real as those concerns are, however, redress lies with Congress and the Federal Reserve Board, not with the courts." 573 F.2d at 578.

The Ninth Circuit noted that Congress was silent on the disclosure of acceleration clauses ("Congressional silence is a dubious indicium of legislative intent" [*St. Germain v. Bank of Hawaii, supra,* 573 F.2d at 574]) and agreed that additional disclosures could "ultimately defeat the informative purposes that Congress had in mind" (*Kessler v. Associates Financial Services Co., supra,* 573 F.2d at 578). The Court nevertheless chose to require a disclosure that is not

explicitly or implicitly required by either the Act or Regulation Z and that runs contrary to the clear interpretations of the Federal Reserve Board and every other Circuit Court that has decided the issue. While recognizing that "the vagaries of the construction of TILA and Regulation Z can be traps for even wary lenders" (*Kessler v. Associates Financial Services Co., supra,* 573 F.2d at 578) the Court has sprung that trap on the lenders thereby exposing the credit industry to liability for statutory penalties on millions of consumer credit transactions and leaving the creditors to the solace that "redress lies with Congress and the Federal Reserve Board" (*Kessler v. Associates Financial Services Co., supra,* 573 F.2d at 578) even though such results were never contemplated by Congress[11] and have been expressly rejected by the Board.

III.

The Decision Below Throws Open to Serious Question the Validity of Millions of Consumer Credit Disclosure Forms Under the Truth in Lending Act.

As a result of these conflicting decisions, many consumer installment contracts that comply with the Act and Regulation Z in one jurisdiction will be found in violation of the Act and Regulation in another

[11]In fact, the legislative history demonstrates that Congress' silence was not unintentional since Congress considered the exercise by a creditor of its remedies upon default and the effect of those remedies on the rates disclosed to the consumer to be a "subsequent occurrence" under 15 U.S.C. § 1634. The Senate report on Section 4(h) of S.5, which became 15 U.S.C. § 1634, states:

> "A repossession permitted by state law but not mutually agreed to by both parties would affect the rate. The new language makes it clear that such a change would not violate the act." S. Report No. 392, 90th Cong., 1st Sess. 18 (1967).

Acceleration, like repossession, is a remedy of the creditor upon default.

jurisdiction. In still other jurisdictions, the status of the law on this important question is unclear. This conflict and confusion defeats the nationwide uniformity that Congress sought to achieve in adopting the Act. This Court should intervene in order to eliminate these irreconcilable conflicts and promote uniformity of decision and disclosure.

Although the dollar amount involved in these cases may appear to be small, the potential civil liability facing creditors whose forms do not comply with the Ninth Circuit's novel and unprecedented holding is truly staggering.

Under the Act, one single violation of the disclosure requirements of either the Act or Regulation Z exposes a creditor to civil liability equal to double the amount of the finance charges imposed in the transaction, with a maximum liability of $1,000 and a minimum liability of $100.00. Truth in Lending Act § 130(a) [15 U.S.C. § 1640(a)]. This liability is penal in nature since it is imposed without regard to whether the debtor suffered any actual damage and without regard to whether the creditor's violation was intentional.

Since there are well in excess of 60,000,000 consumer installment contracts in existence today, virtually all of which contain an acceleration clause, the consumer credit industry has an enormous stake in the outcome of this action. The decision of the Court below on the acceleration question represents a radical and unprecedented departure from prior judicial decisions and Board interpretations. The Court's holding that the

right to accelerate an indebtedness somehow constitutes a "prepayment" of the indebtedness conflicts with the plain meaning of the term "prepayment" as used in Section 226.8(b)(7) and defies logic and common sense. Few, if any, creditors could have anticipated such a strained construction of Regulation Z with the result that millions of disclosure statements now violate the Act and Regulation Z. These unforeseen and unavoidable violations may result in huge penalties being imposed against creditors. This Court should intervene to prevent such an injustice from occurring.

Without regard to what disclosure rule ultimately evolves out of the conflicting decisions on the acceleration issue, the consumer credit industry should at least be provided with a consistent and uniform interpretation of the Act and Regulation Z that can be used in drafting disclosure forms. Given the current state of confusion and chaos in the Circuits on the acceleration issue, only this Court can provide such uniformity.

Conclusion.

Under the decisions of the Ninth Circuit, countless millions of disclosure statements have been thrown into violation of the Truth in Lending Act and Regulation Z. In five other Circuits, the same disclosure forms that were held in violation of the Act and Regulation Z below would be valid, and in another five Circuits the fate of the forms is as yet undecided. Six Circuits and the Federal Reserve Board have issued rulings upon this matter. They are in conflict. The issues far transcend the instant case. The matter is now ripe

for consideration by this Court. For all of the above reasons, petitioners respectfully request that a writ of certiorari issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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Dated: March 26, 1979.

APPENDIX A

United States Court of Appeals for the Ninth Circuit.

Dennis Milhollin and Michelle Milhollin, Plaintiffs-Appellees, v. Ford Motor Credit Co., a corporation, and Dee Thomason Ford, a corporation, Defendants-Appellants.

Dennis Milhollin and Michelle Milhollin, Plaintiffs-Cross Appellants, v. Ford Motor Credit Co., a corporation, and Dee Thomason Ford, a corporation, Defendants-Cross Appellees.

Donna M. Eaton, Plaintiff-Appellee, v. Ford Motor Credit Co., a corporation, Defendant-Appellant, Bud Meadows Mazda, Inc., Defendant.

Darrell Messinger, Plaintiff-Appellee, v. Ford Motor Credit Co., a corporation, and Marv Tonkin Ford Sales, Inc., a corporation, Defendants-Appellants.

David P. Andresen, Plaintiff-Appellee, v. Ford Motor Credit Co., a corporation, and Webster-Wolfard Ford, Inc., a corporation, Defendants-Appellants, and The California Loan and Finance Association, Amicus Curiae. Nos. 76-2914, 76-3217, 77-3084, 77-3584 and 77-3569.

Appeal from the United States District Court for the District of Oregon.

Decided: December 28, 1978.

Before WRIGHT and GOODWIN, Circuit Judges, and JAMESON,* District Judge.

EUGENE A. WRIGHT, Circuit Judge:

In these consolidated cases, Ford Motor Credit Corporation (Ford Credit) and several Ford dealers appeal

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*Senior District Judge, District of Montana.

from adverse judgments finding that they violated provisions of the Truth in Lending Act, 15 U.S.C. §§ 1601 *et seq.* (1976) (Act) and the regulations promulgated thereunder, 12 C.F.R. § 226.1 *et seq.* (1978) (Regulation Z).[1] Milhollin cross appeals from a limitation of Ford Credit's liability.

Although plaintiffs below (Consumers) allege a number of violations, we need to decide only two issues common to the above cases and one issue raised by the Milhollins:

(1) Whether Ford Credit was clearly identified as a creditor on the face of the contract;

(2) Whether it is necessary to disclose an acceleration clause on the face of the contract; and

(3) Whether an inadequate disclosure made to a husband and wife as joint obligors results in a multiple recovery.

I.
FACTS[2]

Ford Credit, wholly owned by the Ford Motor Company, provides financing for Ford dealers by extending operating and inventory loans and by purchasing retail installment contracts for the sale of automobiles by dealers.

A Ford Credit booklet explains its program to dealers and gives guidelines for drafting contracts it is willing to purchase. It also provides forms of credit applications, contracts and rate charts for calculating finance charges. Use of the supplied forms is not mandatory,

[1]Sections of Regulation Z cited here have remained the same in all relevant respects since these actions arose.

[2]These are the facts common to all above cases. Facts unique to a single case are presented later in the text, as necessary.

and Ford Credit purchases contracts on other agreement forms. Many dealers disregard the suggested rate charts and develop their own finance charges.

Dealers negotiate all terms of contracts directly with customers, including the interest rate. Contracts are typically assigned shortly after sales are consummated. Although Ford Credit normally is unaware of any specific sale until the contract is proffered for assignment, dealers may get prior approval for customers with marginal credit ratings.

Ford Credit is not obligated to purchase any contracts from dealers, but usually rejects only a small percentage of those offered. It pays dealers cash for the contracts less its discount.

Each dealer here has assigned the great majority of its contracts to Ford Credit.[3] Shortly after each sale Ford Credit purchased the contract, notified the buyer, and provided him a payment book. Consumers made subsequent payments to Ford Credit.

II.
DISCLOSURE OF FORD CREDIT AS A CREDITOR

In each of these cases, the district court found that Ford Credit was not clearly identified as a creditor on the face of the contract, and that this nondisclosure violated the Act and Regulation Z. To uphold the district court, we must conclude that (a) the identity of each creditor is a required disclosure under the Act or Regulation Z; (b) Ford Credit is a creditor

[3]In *Messinger*, of 600 to 700 contracts assigned six months prior to and six months after the transaction with the plaintiff, the dealer assigned all but 100 to Ford Credit. The dealer in *Andresen* assigned 90% of its contracts to Ford Credit.

in these transactions within the meaning of the Act; and (c) Ford Credit's status as a creditor was not adequately disclosed on the face of the contract.

Consumers maintain that Regulation Z requires the disclosure of each creditor to a transaction on the face of the contract.[4] A number of courts have agreed.[5] Consumers also interpret a Federal Reserve Board Official Staff Interpretation of Regulation Z to require disclosure of each creditor.[6] Ford Credit reads the

[4]Regulation Z provides:

> "*General rule.* Any creditor when extending credit other than open end credit shall, in accordance with § 226.6 and to the extent applicable, make the disclosures required by this section with respect to any transaction consummated on or after July 1, 1969 . . [S]uch disclosures shall be made before the transaction is consummated. At the time disclosures are made, *the creditor shall furnish the customer with a duplicate of the instrument or a statement by which the required disclosures are made and on which the creditor is identified.*"

12 C.F.R. § 226.8(a) (1978) (emphasis added).

> "*Multiple creditors or lessors; joint disclosure.* If there is more than one creditor or lessor in a transaction, *each creditor or lessor shall be clearly identified* and shall be responsible for making only those disclosures required by this Part which are within his knowledge and the purview of his relationship with the customer or lessee. If two or more creditors or lessors make a joint disclosure, *each creditor or lessor shall be clearly identified.*"

Id. at § 226.6(d) (emphasis added).

[5]*E.g., Lauletta v. Valley Buick, Inc.*, 421 F.Supp. 1036, 1039 (W.D.Pa.1976); *Pedro v. Pacific Plan of California*, 393 F.Supp. 315, 319-20 (N.D.Cal.1975).

Although this court has not addressed this precise issue, it intimated that the identification of each creditor is required by invalidating a disclosure statement that did not identify one of two joint creditors in its description of that element of the finance charge going to that creditor. *Ljepava v. M. L. S. C. Properties, Inc.*, 511 F.2d 935, 942 (9th Cir. 1975) (citing 12 C.F.R. §§ 226.6(d), 226.8(d)(3) (1974)).

[6]In 1976 the Federal Reserve Board was asked whether a disclosure statement in which the finance charge, annual percentage rate, and name of the creditor were printed in the same size type satisfied the requirements of 12 C.F.R. § 226.6(a) (1978), which states that the terms "finance charge" and "annual percentage rate" "shall be printed more conspicuously than other terminology required by this part."

The Board's response, issued prusuant to the authority granted by 12 C.F.R. § 226.1(d) (1978), stated: "Although *the identification of a creditor is a required disclosure under § 226.-8(a)*, this disclosure does not constitute required 'terminology.'" Official Staff Interpretation of Regulation Z, 41 Fed.Reg. 41908 (1976) (Emphasis added).

We have held that "[g]reat deference is especially due the Federal Reserve Board's construction of its own Regulation Z because of the important interpretative and enforcement powers granted this agency by Congress under the Truth in Lending Act." *Bone v. Hibernia Bank*, 493 F.2d 135, 139 (9th Cir. 1974). *See also Anthony v. Community Loan & Investment Corp.*, 559 F.2d 1363, 1367 (5th Cir. 1977); *Johnson v. McCrackin-Sturman Ford, Inc.*, 527 F.2d 257, 267 n.23 (3d Cir. 1975).

Official Interpretation narrowly to reach an opposite result.[7]

Consumers allege that Ford Credit is a creditor within the meaning of the Act[8] because it extended credit directly to them, using the dealers merely as a means to arrange for the credit. Ford Credit argues that it was a subsequent assignee of the retail installment contract, extending only commercial credit to the dealers. It cites the apparently different treatment accorded an "original creditor" and a "subsequent assignee" in various sections of the Act as evidence that Congress did not intend subsequent assignees to

[7]Ford Credit relies on the strained reading given 12 C.F.R. § 226.8(a) (1978) and the Official Staff Interpretation in *Grey v. European Health Spas, Inc.*, 428 F.Supp. 841, 843 (D.Conn.1977).

[8]Regulation Z defines "creditor" as

> a person who in the ordinary course of business regularly extends or arranges for the extension of consumer credit, or offers to extend or arrange for the extension of such credit, which is payable by agreement in more than four instalments, or for which the payment of a finance charge is or may be required, whether in connection with loans, sales of property or services, or otherwise.

12 C.F.R. § 226.2(s) (1978).

be subject to the same disclosure requirements as creditors.[9] Consumers respond by citing cases that, in certain circumstances, equate subsequent assignees with creditors for disclosure purposes.[10]

For our purposes it is unnecessary to decide whether the identification of each creditor is a required disclosure or if Ford Credit is a creditor of Consumers. Assuming an affirmative answer to these questions, we conclude that the status of Ford Credit, even if it is as a creditor, was adequately disclosed.

On the face of each contract, opposite the signature of Consumers, appears the following disclosure:

> The foregoing contract hereby is accepted by the Seller and assigned to Ford Motor Credit Company in accordance with the terms of the assignment set forth on the reverse side hereof.
>
> Seller ....
>
> By .... Title ....

Consumers argue that the terms of 12 C.F.R. § 226.6(d) (1978) which provide that "each creditor . . . shall be clearly identified," are not met by disclosing that Ford Credit would be an assignee of the contract.

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[9] *See, e.g.*, 15 U.S.C. §§ 1614, 1640(d), 1641 (1976).

[10] *Meyers v. Clearview Dodge Sales, Inc.*, 539 F.2d 511, 514-16 (5th Cir. 1976); *Mirabal v. General Motors Acceptance Corp.*, 537 F.2d 871, 874 n.1 (7th Cir. 1976); *Joseph v. Norman's Health Club, Inc.*, 532 F.2d 86, 91-92 (8th Cir. 1976); *Bird v. Goddards Discount Furniture*, 443 F.Supp. 422, 423-24 (S.D.Ill.1978); *Poirrier v. Charlie's Chevrolet, Inc.*, 442 F.Supp. 894, 895-96 (E.D.Mo.1978); *Cenance v. Bohn Ford, Inc.*, 430 F.Supp. 1064, 1068-69 (E.D.La.1977); *Lauletta v. Valley Buick, Inc.*, 421 F.Supp. 1036, 1039 (W.D. Pa.1976); *Starks v. Orleans Motors, Inc.*, 372 F.Supp. 928, 930 (E.D.La.1974), *aff'd*, 500 F.2d 1182 (5th Cir. 1974); *Kriger v. European Health Spas, Inc., of Milwaukee, Wisconsin*, 363 F.Supp. 334, 336 (E.D.Wis.1973); *Garza v. Chicago Health Clubs, Inc.*, 347 F.Supp. 955, 963-64 (N.D.Ill.1972).

They apparently argue that, because the precise word "creditor" was not used in describing Ford Credit's prospective involvement in the transaction, the Act was violated. We disagree. Nowhere does Regulation Z require use of the word "creditor." Here, the exact role that Ford Credit ultimately played in each transaction was clearly disclosed. Requiring Ford Credit to use the word "creditor" would not have given Consumers additional information nor better served the purposes of the Act.

In *Main v. Faller Ford, Inc.*, Civil Action No. 74-337 (W.D.Pa. Apr. 22, 1976), the court held that an identical statement satisfied the creditor disclosure requirements of Regulation Z:

> Whether Ford Credit may be described as the term is used in [12 C.F.R.] § 226.6(d) need not be decided in this factual context because to require such a disclosure by Ford Credit on a separate piece of paper would not be a meaningful disclosure nor would it further the goals of the Truth-In-Lending Act. Ford Credit was accurately described in the contract as the assignee and it is undisputed that plaintiff personally understood that Ford Credit would actually extend her credit and consequently be the recipient of her monthly installment payments. . . . To require Ford Credit to also disclose to plaintiff that it was also a "creditor" within the Act would be a meaningless and needless exercise providing plaintiff with duplicative information, and such duplication cannot be justified by the Act's purpose nor by the practical considerations of these circumstances.

Accord, Sharp v. Ford Motor Credit Co., 452 F.Supp. 465 (S.D.Ill.1978) (appeal pending); *Antonio v. Canal Motors, Inc.*, Civil Action No. 74-3163 (E.D.La. Nov. 18, 1977) (appeal pending); *Augusta v. Marshall Motor Co.*, 453 F.Supp. 912 (N.D.Ohio 1977) (appeal pending).

We agree with the reasoning in *Main* and hold that the district court erred in finding that Ford Credit was not adequately identified as a creditor on the face of the contract.[11]

III.
DISCLOSURE OF AN ACCELERATION CLAUSE

The reverse side of each contract contained an acceleration clause that did not explain the effect of acceleration on unearned interest. Ford Credit maintains that its uniform practice, although not explicitly disclosed, is to rebate unearned interest to the customer upon acceleration in the same manner as that following a voluntary prepayment.

This court faced a similar situation in *St. Germaine v. Bank of Hawaii*, 573 F.2d 572 (9th Cir. 1977). We held there that

> [t]he creditor must disclose whether a rebate of unearned interest will be made upon acceleration and also disclose the method by which the amount of unearned interest will be computed if the debt is accelerated.

Id. at 577. Failure to make these disclosures is a violation of the Act.

[11]Since we conclude that Ford Credit's disclosure of its status was adequate, we need not consider the sufficiency of additional disclosures attached to the contract in *Andresen.*

In *Milhollin*, the district court concluded on different grounds than those stated in *St. Germaine* that failure to disclose the acceleration clause on the face of the contract was a violation of the Act. The court held, however, that it would result in liability only after the decision in *Woods v. Beneficial Finance Co. of Eugene*, 395 F.Supp. 9 (D. Or. 1975), the first Oregon case recognizing this nondisclosure as a violation. In so holding, the district court exceeded its authority because "[t]he application of doctrines limiting the retroactivity of judicial decisions is restricted to appellate courts." *Kessler v. Associates Financial Service Co.*, 573 F.2d 577, 579 (9th Cir. 1977).

We hold on the basis of *St. Germaine* that Ford Credit is liable to the Milhollins for failure to disclose the acceleration clause and its effect on unearned interest on the face of the contract.

IV.
RECOVERY FOR INADEQUATE DISCLOSURE BY JOINT OBLIGORS

At the time of the transaction in *Milhollin*, plaintiffs were husband and wife. Both signed the retail installment contract, making them jointly and severally liable for the full debt under Oregon law. They allege that the district court erred in limiting them as joint obligors to one recovery for violations under the Act.

The Act provides:

> [A]ny creditor who fails to comply with any requirement imposed under this part . . . with respect *to any person* is liable to *such* person in an amount equal to the sum of—
>
> . . .

(2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction . . ., except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000 . . . .

15 U.S.C. § 1640(a) (1976). The first quoted words emphasized, "any person" and "such person," suggest that each joint obligor is entitled to a separate recovery. The emphasized words in the second paragraph, however, suggest that the liability for any single transaction is limited to $1,000.

The circuits have split on this issue. The Fifth and Seventh Circuits have concluded that a husband and wife as joint obligors are entitled to separate recoveries. *Davis v. United Companies Mortgage & Inv. of Gretna, Inc.*, 551 F.2d 971 (5th Cir. 1977); *Mirabal v. General Motors Acceptance Corp.*, 537 F.2d 871, 881-83 (7th Cir. 1976); *Allen v. Beneficial Finance Co. of Gary*, 531 F.2d 797, 805-06 (7th Cir.), cert. denied, 429 U.S. 885, 97 S.Ct. 237, 50 L.Ed.2d 166 (1976). The Fourth Circuit reached the opposite result in *Powers v. Sims and Levin*, 542 F.2d 1216, 1219-20 (4th Cir. 1976), in which the court limited the recovery of husband and wife as joint obligors to one penalty.

We believe that the Fourth Circuit's approach more closely reflects the intent of Congress. The applicable legislative history states:

> Any creditor failing to disclose required information would be subject to a civil suit with a penalty equal to twice the finance charge, with a minimum penalty of $100 and a maximum penalty not to exceed $1,000 on any individual credit transaction.

H.R.Rep.No. 1040, 90th Cong., 2d Sess., [1968] U.S. Code Cong. & Admin. News, pp. 1962, 1976 (emphasis added). The Milhollins, although joint obligors, entered into one credit transaction with the dealer and Ford Credit. They are entitled to one recovery.

IV.
CONCLUSION

Because the district court in *Andresen and Messinger* concluded Ford Credit violated the Act only on the basis of an inadequate disclosure of its creditor status, a conclusion we reject, we remand those cases for a consideration of other alleged violations of the Act not treated by the court.

Although the district court in *Milhollin* found liability on the ground used in *Andresen* and *Messinger*, it also concluded Ford Credit violated the Act by failing to disclose an acceleration clause on the face of the contract. In light of *St. Germaine*, we disagree with the rationale used by the court, but hold on other grounds that Ford Credit violated the Act by failing to disclose an acceleration clause and its effect on unearned interest. We also disagree with the court's prospective application of *Woods*, and hold that Ford Credit is liable to the Milhollins for its nondisclosure. As joint obligors, they are entitled to only one recovery.

We affirm the holding of the district court in *Eaton*, again under a different rationale,[12] on the basis of

[12]Noting that it would be "a waste of judicial time and effort" to set forth the reasons for its decisions in light of the thorough discussion in *Milhollin*, then on appeal to this court, the district court in *Eaton* merely adopted the rationale of *Milhollin*. We agree with the conclusion in *Milhollin* that failure to disclose an acceleration clause on the face of a contract is a violation of the Act, but do so on different grounds.

Ford Credit's failure to disclose an acceleration clause and its effect on unearned interest on the face of the contract.[18]

AFFIRMED IN PART AND REVERSED IN PART.

[18]Since multiple violations of the Act in any single credit sale transaction result in only one recovery, 15 U.S.C. § 1640(g) (1976), it is unnecessary to consider any other alleged violations in *Milhollin* and *Eaton*.

APPENDIX B

Recommendation and Order

In the United States District Court for the District of Oregon.

Dennis Milhollin and Michelle Milhollin, Plaintiffs, vs. Ford Motor Credit Co., a corporation, and Dee Thomason Ford, a corporation, Defendants. Civil No. 75-334.

Filed: April 7, 1976.

This is an action for money damages brought under the Truth in Lending section of the Consumer Credit Protection Act, 15 U.S.C. § 1601, *et seq.*, for alleged violations of the Truth in Lending Act ("Act"), and Federal Reserve Board Regulation Z ("Reg. Z"), 12 C.F.R. § 226, *et seq.* Jurisdiction is conferred by 15 U.S.C. § 1640(e).

In July of 1974, plaintiffs, Dennis and Michelle Milhollin, purchased a 1973 Ford Pinto automobile from defendant Dee Thomason Ford on a deferred payment plan. The purchase price was $3,098.00 and the deferred payment price $3,983.64. Plaintiffs put down a cash payment of $400.00 and were allowed a $300.00 trade-in allowance on their old automobile. Additionally, a $200.00 ballon payment to be made August 12, 1974, further increased the down payment to a total of $900.00. The sum of $2,372.80 was financed at an annual percentage rate of 17.91%.

After the $200.00 balloon payment, plaintiffs were to pay 35 monthly installments of $85.68 each and one final installment of $85.84 commencing on August 29, 1974. Because plaintiffs did not maintain property damage insurance on the automobile, the assignee of

the purchase contract, defendant Ford Motor Credit Company ("FMCC"), obtained this insurance and added the premium to the principal. This resulted in the payments due being increased to $94.61 per month beginning with the December 29, 1974, payment.

FMCC, without notification to the plaintiffs, repossessed the automobile on February 21, 1975. FMCC gives as reasons for repossession: (a) default in payment of installments due under the contract (two payments were overdue); (b) failure to supply evidence of insurance; and (c) FMCC deemed the indebtedness and property "insecure." FMCC's answer to plaintiffs' interrogatory 15.

By letter dated the same day as the repossession, February 21, 1975, plaintiffs, through their attorney, offered to pay the delinquent amount. FMCC responded that it had elected to accelerate the amount due. This acceleration had the effect of forcing plaintiffs to pay $2,440.42 rather than the overdue amount in order to redeem the automobile. Plaintiffs were not able to make the payment, and the Pinto was re-sold.

Plaintiffs allege that the contract violated the Act and Reg. Z in four particulars:

(1) Failure to disclose the acceleration clause on the face of the contract;

(2) Failure to disclose clearly and conspicuously that plaintiffs were required to obtain physical damage insurance on the automobile;

(3) Failure to clearly identify FMCC as a creditor on the face of the contract;

(4) Failure to describe or identify the type of security interest retained or acquired by FMCC.

Each plaintiff seeks the maximum allowable damages of $1,000.00.

All parties move for summary judgment. Fed. R. Civ. P. 56. I find that there is no genuine and material issue of fact in dispute.[1] Therefore, this matter is ripe for summary judgment.

I. WAS FMCC A "CREDITOR"?

FMCC contends that it is not subject to the Act or Reg. Z for any violations contained in the contract in that, with regard to this transaction, it is not a "creditor" within the meaning of the statute and regulations. It maintains that assignees were not specifically made subject to the Act until October 28, 1974 (after the contract in issue was executed). Act of Oct. 28, 1974, Pub. L. 93-495, Title IV, § 413(a), 88 Stat. 1520, *adding* 15 U.S.C. § 1614. Therefore, FMCC's argument continues, it could not have been subject to the Act prior to the enactment of § 1614.

Plaintiffs counter with the assertion that FMCC was the true creditor in this transaction, and Dee Thomason was merely a "conduit." Thus, FMCC would have been subject to the Act as a "creditor" even before the enactment of § 1614.

[1]Dee Thomason contends that its attempted good faith compliance with the Act and Reg. Z is a valid defense here, and, in any event, the factual issues of good faith and alleged oral disclosures made to the plaintiff preclude summary judgment. A recent 10th Circuit case, *Redhouse v. Quality Ford Sales, Inc.*, 511 F.2d 230 (10th Cir. 1975), is cited by Dee Thomason for the proposition that damages are improper in Truth in Lending Act cases where the debtor is supplied with full disclosure, be it on the face of the contract or oral. Insofar as *Redhouse* can be read as holding good faith, oral disclosure, or lack of damage causation to be defenses to violations of the Act or Reg. Z, I respectfully must disagree. I find nothing in the statute or its legislative history which suggests that any standard other than strict liability should be applied.

I agree with the plaintiffs. The conduit approach has been applied in many analogous situations before the enactment of § 1614.[2] Here, at the same time as the sale of the automobile, and in the same transaction, Dee Thomason arranged for the extension of credit by FMCC, and assigned the purchase contract to FMCC. The transaction involving Dee Thomason and FMCC was undertaken pursuant to the usual business practices of defendants in regularly arranging for the extension of credit to consumers. That this was the usual business practice of Dee Thomason and FMCC is evidenced by the following facts: (a) The contract was printed by defendant FMCC, naming FMCC as the assignee; (b) In 1974, Dee Thomason assigned 345 such contracts to FMCC; (c) FMCC financed substantially all of the retail installment contracts signed with Dee Thomason; and (d) The assignments were made pursuant to instructions contained in a booklet issued by FMCC. FMCC's answers to plaintiffs' interrogatories 4, 26 and 27.

Additionally, it should be noted that the terms of the Act itself would seem to apply to FMCC here, even without the judicially engrafted "conduit theory." Section 103(f) of the Act, 15 U.S.C. § 1601(f) defines a creditor as one who:

> [R]egularly extend[s], or arrange[s] for the extension of, credit for which the payment of a finance charge is required, whether in connection with loans, sales of property or services, or otherwise. The provisions of this subchapter apply to any such creditor, irrespective of his or its status as a natural person or any type of organization.

[2]See, e.g., *Johnson v. Johnson,* IV CCH Consumer Credit Guide ¶ 98,556, II Poverty Law ¶ 21,220 (M.D. Ga. 1975); *Meyers v. Clearview Dodge Sales, Inc.,* 384 F. Supp. 722 (E.D. La. 1974); *Philbeck v. Timmers Chevrolet, Inc.,* 361 F. Supp. 1255 (N.D. Ga. 1973), *rev'd on other grounds,* 499 F.2d 971 (5th Cir. 1974); *Garza v. Chicago Health Clubs, Inc.,* 347 F. Supp. 955 (N.D. Ill. 1972); *Joseph v. Norman's Health Club, Inc.,* 336 F. Supp. 307 (E.D. Mo. 1971).

I conclude, therefore, that, with respect to the transaction at issue here, FMCC is a creditor within the meaning of the Act.[3]

II. DISCLOSURE OF THE ACCELERATION CLAUSE

The Act requires that the creditor must disclose "the default, delinquency, or similar charges payable in the event of late payments." 15 U.S.C. § 1639(a)(7). Plaintiffs contend that the right of acceleration constitutes a "charge" within the meaning of section 1639(a)(7), and must be disclosed on the face of the contract.

Plaintiffs and FMCC have both provided excellent briefs to the court on this issue. Ample authority supports the position that an acceleration clause is a "charge." Ample authority also supports the position that where, as here, only accrued interest becomes due in case of acceleration, the acceleration clause is not a "charge." I feel compelled both by *stare decisis* and logic to follow Judge Skopil's ruling in *Woods v. Beneficial Finance Co. of Eugene,* 395 F. Supp. 9 (D.Or. 1975). The duty to disclose and fully explain any right of acceleration was made clear in *Woods.* That duty, however, is prospective in this District from the date of the *Woods* decision, February

[3]This holding is, of course, limited to the facts of this case.

14, 1975. 395 F. Supp. at 16. Since the transaction in issue took place before *Woods,* there was no duty at that time upon either Dee Thomason or FMCC to disclose the acceleration clause.[4]

III. DISCLOSURE OF THE INSURANCE REQUIREMENT

Plaintiffs maintain that since failure to obtain property damage insurance on the automobile can result in default and acceleration, it also constitutes a "charge" under section 1639(a)(7), and must be disclosed.

Although plaintiffs' argument is somewhat plausible, it is rejected for two reasons:

(1) 12 C.F.R. § 226.4(a)(6), which sets forth the physical damage insurance disclosure requirements (these being in conjunction with disclosures for the determination of the finance charge), has been complied with. Just above the buyer's signature by which Mr. Milhollin acknowledged his desire to obtain life and disability insurance in connection with the contract appears the notice:

> (2) You have the right to choose the person through whom the Physical Damage Insurance *required* under this contract is to be obtained.
>
> (Emphasis added).

(2) No authority is cited in support of the proposition that FMCC's decision to take out insurance on the automobile because of plaintiffs' failure to do so constitutes a "charge" within the meaning of 15 U.S.C. § 1639(a)(7).

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[4]Plaintiffs' suggestion that the defendants' duty after the *Woods* decision was to change those contracts previously entered into is, to say the least, unrealistic.

IV. CLEAR IDENTIFICATION OF FMCC

Section 226.6(b) of Reg. Z provides:

> If there is more than one creditor in a transaction, *each creditor* shall be clearly identified and shall be responsible for making only those disclosures required by this part which are within his knowledge and purview of his relationship with the customer.
>
> (Emphasis added).

Section 226.8(a) provides:

> All of the disclosures shall be made together on either
>
> (1) the note or other instrument evidencing the obligation on the same side of the page and above or adjacent to the place for the customer's signature; or
>
> (2) one side of a separate statement which identifies the transaction.

The only reference to FMCC on the face of the contract is one sentence in quite small type just above the place for the *seller's* signature. This sentence states: "The foregoing contract hereby is accepted by the Seller and assigned to Ford Motor Credit Company in accordance with the terms of the Assignment set forth on the reverse side hereof." Dee Thomason Ford, on the other hand, is identified at the top of the face of the contract in rather large writing.

FMCC has not been identified clearly within the meaning of Reg. Z. In a situation such as this where the true creditor is a credit company, that entity should be clearly identified so that the debtor knows whom or what he is doing business with. I must assume

that the only reason for placing FMCC's name in small type on the face of the contract in an obscure place is that, hopefully at least, the debtor will fail to read this provision. It is not too much to ask that the true creditor be identified in the same manner the seller is.

V. DESCRIPTION OF SECURITY INTEREST

By virtue of the terms of the purchase contract, FMCC took a security interest in the Pinto automobile when the contract was executed. This security interest was perfected the same date as the sale by notation on the certificate of title. ORS 79.3020(1)(d). The disclosure with regard to this security interest states the following:

> (13) Security Interest: Seller shall have a security interest under the Uniform Commercial Code in the Property (described above) and in the proceeds thereof to secure the payment in cash of the Total of Payments and all other amounts due or to become due hereunder.

Section 226.8(b)(5) provides that the required disclosures must include:

> A description or identification of the type of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, and a clear identification of the property to which the security interest relates or, if such property is not identifiable, an explanation of the manner in which the creditor retains or may acquire a security interest in such property which the creditor is unable to identify . . . . If after-acquired property will be subject to the security interest, or if other or future indebtedness is or may be secured by any such property, this fact shall be clearly set forth in conjunction with the description or identification of the type of security interest held, retained or acquired.

The defendants' disclosure of their security interests fail to comply with Reg. Z. First, there is no indication that any security interest is held by FMCC.

Secondly, the "description" of the type of security interest held by FMCC and Dee Thomason amounts to little more than a statement that "a security interest under Oregon law" is retained by the seller. (The Uniform Commercial Code is codified at ORS 71.1020, *et seq.*). It should be noted that *Woods* held that the *incorrect* disclosure that the security interest involved covered after-required consumer goods was a violation of Reg. Z. At the least, defendants should have disclosed the *type* of security interest retained under the UCC.[5] Otherwise, a consumer might easily be misled as to his rights in the collateral.

Thirdly, the language "and all other amounts due or to become due hereunder" is, as was the language in *Woods,* surplusage which could be confusing not only to a consumer, but to an attorney as well. Is this meant to be cross-collateral clause,[6] or merely

[5] This is not to require, as FMCC suggests, that an index of the types and qualities of different security interests possible under the UCC must be disclosed. Something more than the brief statement that "a security interest under the Uniform Commercial Code" is required, however.

[6] For an example of this type of financing arrangement, see *Williams v. Walker-Thomas Furniture Co.,* 350 F.2d 445 (D.C. Cir. 1965).

It is doubtful that a cross-collateral clause was intended in this transaction where only a single automobile was purchased. The language which describes the security interest does not, however, alleviate the confusion.

a statement that add-ons (such as the insurance premiums in this case) also shall become secured? The generality of the language produces uncertainty.

FMCC would be wise to heed the recent statement of Judge Solomon with regard to language used by insurance companies in their policies:

> Insurance companies could prepare policies in clear, simple and precise language which would inform insureds of the limits of their coverage. Insurance companies could avoid the risk of ambiguity if they use short and precise words and short and simple sentences to express their intent clearly. In spite of continued admonitions of the courts to get rid of such language, insurance companies continue to issue such policies using insurance jargon and verbose and meaningless generalities, all of which result in ambiguities.

Champion International Corp. v. Continental Casualty Co., 400 F. Supp. 978, 981 (S.D.N.Y. 1975).

Again, I must assume that the generality and obscure nature of the language are intended to either confuse the consumer or hide something from him.

VI. DAMAGES

Section 130 of the Act, 15 U.S.C. § 1640(a)(1), sets the damages recoverable as twice the finance charge "in connection with the transaction, except that the liability under this paragraph shall not be less than $100 nor greater than $1,000." 15 U.S.C. § 1640(a)(2) also provides for the recovery of attorney's fees and costs for the successful plaintiff.

Plaintiffs contend that under the Act, joint borrowers are entitled to recover twice the amount of the damages

specified thereunder. This argument is based on the proposition that both debtors are required to receive the disclosures required by the Act and that each is therefore entitled to damages. This contention fails for two reasons.

First, the language of section 1640 itself is directed at the "transaction" involved, not the parties involved.

Secondly, the congressional intent to limit the recovery in a single credit transaction to $1,000.00 despite the number of borrowers is quite clear. The House Banking and Currency Committee Report, 1968 U.S. Code Cong. & Admin. News at 1976, states the purpose of the civil liability section as follows:

> While the primary enforcement of the bill would be accomplished under the administrative enforcement section . . . further provision is made for the institution of any civil action by an aggrieved debtor. Any creditor failing to disclose required information would be subject to civil suit with a penalty equal to twice the finance charge, with a minimum penalty of $100 and a maximum penalty of $1,000 *on any individual credit transaction* . . . (Emphasis added).

The plaintiffs, therefore, are entitled to $1,000.00, costs and attorney's fees.

Dated this 6 day of April, 1976.

/s/ George E. Juba
United States Magistrate

After review of the file and record in this case, I approve the foregoing recommendation.

IT IS ORDERED that defendants' motions for summary judgment are denied.

IT IS FURTHER ORDERED that plaintiffs' motion for summary judgment is granted. Plaintiffs shall recover from the defendants the sum of $1,000.00. At a subsequent hearing attorney's fees shall be determined.

Dated this 6 day of April, 1976.

/s/ Robert C. Belloni
United States District Judge

Order.

In the United States District Court for the District of Oregon.

Dennis Milhollin and Michelle Milhollin, Plaintiffs, v. Ford Motor Credit Co., a corporation, and Dee Thomason Ford, a corporation. Defendants. Civil No. 75-334.

Filed and entered: June 25, 1976.

This is an action for money damages brought under the Truth in Lending section of the Consumer Credit Protection Act, 15 U.S.C. §1601, *et seq.,* for alleged violations of the Truth in Lending Act, and Federal Reserve Board Regulation Z (Reg. Z), 12 C.F.R. §226, *et seq.* Jurisdiction is conferred by 15 U.S.C. §1640(e).

The undisputed facts of this case are set out in the attached Recommendation and Order dated April 6, 1976. On that date, I reviewed the record, approved Magistrate Juba's recommendation, denied defendants' Motions for Summary Judgment, granted plaintiffs' Motion for Summary Judgment and ordered that plaintiffs recover judgment against the defendants in the sum of $1,000.

The defendants asked for and received a rehearing. I have studied their additional memoranda and have

heard oral argument on the rehearing. Nothing contained in either, however, convinces me that any change in the original opinion should be made.

A recent case out of the Western District of Pennsylvania deserves some comment, however. *Virginia Jones Main v. Faller Ford, Inc. et al.,* Civil No. 74-337 (W.D.Penn. 1976). In that case, the judge believed that the contract adequately identified FMCC as a creditor. I have not seen the contract in the *Main* case. Its wording seems to be identical to the one in the case at hand. The contract in question has, as its only reference on the face of the contract to FMCC as a creditor, one sentence in small type above the place for the *seller's* signature. Dee Thomason Ford, on the other hand, is identified at the top of the face of the contract in rather large writing. FMCC has not been identified clearly within the meaning of Reg. Z.

Defendants ask this court to make this opinion effective only prospectively from the date of this opinion. They have presented no authority, however, which would give this court the power to reach such a result. That request is denied.

IT IS ORDERED that the defendants' motions to modify and/or vacate are denied.

Dated this 25 day of June, 1976.

Robert C. Belloni
United States District Court

Summary Judgment.

United States District Court for the District of Oregon.

Dennis Milhollin and Michelle Milhollin, Plaintiffs, v. Ford Motor Credit Co., and Dee Thomason Ford, Defendants. Civil No. 75-334.

Filed and entered: June 25, 1976.

Based on the record,

IT IS ORDERED AND ADJUDGED that plaintiffs recover from the defendants the sum of $1,000.00 general damages and the sum of $750.00 attorneys fees.

Dated: June 25, 1976.

Robert M. Christ
Clerk of Court

Opinion

In the United States District Court for the District of Oregon.

Donna M. Eaton, Plaintiff, vs. Ford Motor Credit Company, a corporation, Defendant. Civil No. 76-575.

Richard A. Slottee, Legal Aid Service, 1100 Board of Trade Building, Portland, Or. 97204, Attorneys for Plaintiff.

Herbert H. Anderson, John M. Berman, Dezendorf, Spears, Lubersky & Campbell, 800 Pacific Building, Portland, Or. 97204, Attorneys for Defendant.

Filed: June 16, 1977.

SOLOMON, Judge:

Plaintiff filed an action for $607.84 and for reasonable attorneys' fees against the defendant, Ford Motor Credit Company (Ford), asserting that Ford violated the provisions of the Truth in Lending Act and Federal Reserve Board Regulations.

An action raising many of the same issues was decided by Judge Belloni in *Milhollin v. Dee Thomason Ford and Ford Motor Credit Co., Inc.*, Civil No. 75-334 (D.Or., filed April 7, 1976). The Magistrate had found that Ford Motor Credit Co., Inc. was a creditor of the plaintiff, rather than an assignee of the automobile dealer, and that the transaction was governed by the provisions of the Act dealing with creditors. The Magistrate also found that Ford Motor Credit Co., Inc. failed to comply with other provisions of the Act. He therefore denied Ford Motor Credit Co., Inc.'s motion for summary judgment, and he recommended that plaintiff have a judgment against Ford Motor Credit Co., Inc. Judge Belloni reviewed the file and the record, and he granted plaintiff a

judgment in accordance with the recommendations of the Magistrate. Thereafter, Ford Motor Credit Co., Inc., filed a motion to modify or vacate the judgment; and, after a hearing, Judge Belloni denied the motion.

It has been the policy and practice of this Court to respect a fully considered opinion of another Judge of this Court and to follow it unless it appears that an obvious mistake has been made. I have examined the recommendations and order of the Magistrate and the opinion of Judge Belloni in *Milhollin v. Dee Thomason Ford and Ford Motor Credit Co., Inc., supra,* and I have also carefully considered the memorandum of law submitted by counsel in this case, and I find that the conclusions reached by Judge Belloni in *Milhollin* are in accord with other federal court decisions in other jurisdictions. They also are in accord with the opinion of Judge Skopil in *Woods v. Beneficial Finance Co. of Eugene,* 395 F.Supp. 9 (D. Or. 1975).

Judge Belloni's holding has been appealed and is now pending in the Ninth Circuit Court of Appeals. Because of all these facts, it would be a waste of judicial time and effort for me to set forth in detail the reasons why I believe the conclusions reached by Judge Belloni should govern this case.

There is no merit in the contention that plaintiff did not purchase the automobile primarily for personal use, nor is there any merit to the other defenses asserted by Ford.

I therefore find that plaintiff is entitled to a judgment against Ford for $607.84 and for reasonable attorneys' fees of $300.00.

Dated this 16th day of June, 1977.

Gus J. Solomon,
United States District Judge

Judgment.

In the United States District Court for the District of Oregon.

Donna M. Eaton, Plaintiff, vs Ford Motor Credit Company, a corporation, Defendant. Civil No. 76-575.

Filed: Aug. 12, 1977.

Based upon the record,

IT IS ADJUDGED AND ORDERED that plaintiff Donna M. Eaton have and recover from defendant Ford Motor Credit Company the sum of $1,300.

DATED this 12th day of August, 1977.

/s/ Gus J. Solomon
Judge, U.S. District Court

Opinion

In the United States District Court for the District of Oregon.

David P. Andresen, Plaintiff, v. Ford Motor Credit Company, a corporation, and Webster-Wolfard Ford, Inc., a corporation, Defendant. Civil No. 76-1090.

John L. Langslet, James C. Waggoner, Martin, Bischoff, Templeton & Biggs, 2908 First National Bank Tower, Portland, Oregon 97201, Attorneys for plaintiff.

Michael J. Esler, Haessler, Stamer & Esler, 2626 First National Tower, Portland, Oregon 97201, Attorney for defendant Webster-Wolfard Ford, Inc.

John M. Berman, Dezendorf, Spears, Lubersky & Campbell, 800 Pacific Building, Portland, Oregon 97204, Attorney for defendant Ford Motor Credit Company.

Filed: July 26, 1977.

LEAVY, J., U. S. Magistrate.

This is an action for money damages brought under the Truth in Lending section of the Consumer Credit Protection Act, 15 U.S.C. § 1601, *et seq.*, for alleged violations of the Truth in Lending Act (Act), and Federal Reserve Board Regulation Z (Regulation Z), 12 C.F.R. § 226, *et seq.* Jurisdiction is conferred by 15 U.S.C. § 1640(e). Trial was held before the court on July 19, 1977.

On October 5, 1976, plaintiff purchased a 1976 Ford Pinto from defendant Webster-Wolfard Ford, Inc. (Webster). The retail installment contract evidencing this transaction was assigned to and financed by defendant Ford Motor Credit Company (FMCC).

Plaintiff contends that the contract violated the Act and Regulation Z in five particulars:

(1) Failure to make the requisite disclosures clearly, conspicuously, and in meaningful sequence;

(2) Failure to clearly identify FMCC as a creditor on the face of the contract;

(3) Failure to disclose the acceleration clause on the face of the contract;

(4) Disclosure of the $150 payment as both a "pickup" payment and a "ballon" payment, to the confusion of the consumer;

(5) Misstatement of the down payments.

The retail installment contract in the instant case was printed and provided to Webster by FMCC. The evidence discloses that approximately 90 percent of the several hundred retail installment contracts entered into by Webster during the year surrounding the transaction were assigned to FMCC.

On the basis of these facts, I find that FMCC was a creditor in this transaction, and that the contract violated the Act and Regulation Z by failing to clearly disclose this fact on the face of the contract. The court has found similar violations on contracts that are substantially identical to the one involved in the instant case. *Milhollin v. Ford Motor Credit Co.*, Civil No. 75-334 (D. Or. filed April 7, 1976 (on appeal)); *Eaton v. Ford Motor Credit Company*, Civil No. 76-575, (D. Or., filed June 16, 1977). I see no reason to distinguish these cases.

Defendants seek to avoid this result by pointing to additional disclosures made on a separate sheet of paper stapled to the front of the printed retail installment contract. That these additional disclosures

were in fact made is evidenced by plaintiff's signature below them. The regulations, however, are clear. Section 226.8(a) of Regulation Z provides, in relevant part:

> "All of the disclosures shall be made together on either:
>
> (1) The note or other instrument evidencing the obligation on the same side of the page and above the place for the customer's signature; or
>
> (2) One side of a separate statement which identifies the transaction."

I find that the disclosures made in the instant case on two pieces of paper stapled together do not meet the requirement of § 226.8(a). Requiring strict adherence to the technical requirements of the Act and Regulation Z may appear harsh in the instant case. Nonetheless, were the court to approve the use of this procedure in this case, the door would be opened to the types of abuses § 226.8(a) was designed to prevent.

As I have found that the contract violates the Act and Regulation Z as described in number (2) above, I need not reach the alleged violations found in (1), (3), (4) and (5) above. *Madison v. United Finance Company, Inc.*, Civil No. 75-1094, (D. Or., filed July 12, 1976, (on appeal)).

Section 130 of the Act, 15 U.S.C. § 1640(a)(1), sets the damages recoverable for a Truth in Lending violation as twice the finance charge, with a liability not less than $100 nor greater than $1000. 15 U.S.C. § 1640(a)(2) also provides for the recovery of attorney's fees and costs for the successful plaintiff.

The finance charge in this transaction was $585.55. Accordingly, plaintiff is entitled to recover the sum of $1000, costs and attorney's fees. Plaintiff shall within five days submit an affidavit as to his attorney's fees. Defendants shall have five days within which to respond.

This opinion shall constitute findings of fact and conclusions of law in accordance with Fed. R. Civ. P. 52.

Dated this 26th day of July, 1977.

/s/ Edward Leavy
United States Magistrate

Judgment.

In the United States District Court for the District of Oregon.

David P. Andresen, Plaintiff, v. Ford Motor Credit Company, a corporation, and Webster-Wolfard Ford, Inc., a corporation, Defendant. Civil No. 76-1090.

Filed: Aug. 16, 1977.

This action came on for trial before the Court, Honorable Edward Leavy, United States Magistrate, presiding, and the issues were tried and a decision rendered.

IT IS ORDERED AND ADJUDGED that plaintiff, David P. Andresen, recover of defendants Ford Motor Credit Company and Webster-Wolfard Ford, Inc. the sum of $1000 as statutory damages, the further sum of $1000 as attorneys' fees, and his costs of action.

Dated at Portland, Oregon, this 16th day of August, 1977.

/s/ Robert M. Christ
Robert M. Christ
Clerk of Court

Opinion.

In the United States District Court for the District of Oregon.

Darrell Messinger, Plaintiff, vs. Ford Motor Credit Co., a corporation, and Marv Tonkin Ford Sales, Inc., a corporation, Defendant. Civil No. 76-475

Mr. Richard Folkes, Attorney at Law, 18448 S. E. Pine Street, Portland, Oregon 97233, Attorney for plaintiff.

Mr. John Berman, Dezendorf, Spears, Lubersky & Campbell, 800 Pacific Building, Portland, Oregon 97204, Attorney for defendants.

Filed: July 26, 1977.

LEAVY, J., United States Magistrate

This is an action for money damages brought under the Truth in Lending section of the Consumer Credit Protection Act, 15 U.S.C. § 1601, *et seq.*, for alleged violations of the Truth in Lending Act (Act), and Federal Reserve Board Regulation Z (Regulation Z), 12 C.F.R. § 226, *et seq*. Jurisdiction is conferred by 15 U.S.C. § 1640(e). Trial was held before the court on July 19, 1977.

On May 24, 1975, plaintiff purchased a 1975 4-wheel drive pickup truck from defendant Marv Tonkin Ford (Tonkin). The retail installment contract evidencing this transaction was assigned to and financed by defendant Ford Motor Credit Company (FMCC).

Plaintiff contends that the contract violated the Act and Regulation Z in three particulars.[1]

[1]Plaintiff has withdrawn his contention that the contract contained a fourth violation relating to Physical Damage Insurance.

(1) Failure to clearly identify FMCC as a creditor on the face of the contract;

(2) Failure to disclose the acceleration clause on the face of the contract;

(3) Failure to describe or identify the type of security interest retained or acquired by FMCC.

On February 15, 1977, I recommended that plaintiff's motion for summary judgment be denied based on my finding that an issue of fact remained as to whether the pickup truck was purchased for business use, thereby removing the transaction from coverage by the Act. I now resolve that issue in plaintiff's favor. Despite the fact that plaintiff claimed on his income tax return that he used the pickup for business, I find on the basis of plaintiff's testimony that he purchased the truck for personal non-business purposes. The transaction therefore involved the extension of consumer credit as defined by the Act and Regulation Z.

The contract in the instant case was printed and provided to Tonkin by FMCC. The evidence discloses that an estimated 600 to 700 retail installment contracts were entered into by Tonkin during the period commencing six months prior to the transaction and ending six months after the transaction. Of these, all but approximately 100 were assigned to FMCC.

On the basis of these facts, I find that FMCC was a creditor in this transaction, and that the contract violated the Act and Regulation Z by failing to clearly disclose this fact on the face of the contract. This court has found similar violations on contracts that are substantially identical to the one involved in the instant case. *Milhollin v. Dee Thomason Ford and*

Ford Motor Credit Co., Inc., Civil No. 75-334 (D.Or., filed April 7, 1976) (on appeal); *Eaton v. Ford Motor Credit Company,* Civil No. 76-575 (D.Or., filed June 16, 1977). I see no reason to distinguish these cases.

As I have found that the contract violates the Act and Regulation Z as described in number (1) above, I need not reach the alleged violations found in (2) and (3) above. *Madison v. United Finance Company, Inc.,* Civil No. 75-1094, (D.Or., filed July 12, 1976) (on appeal).

Section 130 of the Act, 15 U.S.C. § 1640(a)(1), sets the damages recoverable for a Truth in Lending violation as twice the finance charge, with a liability not less than $100 nor greater than $1000. 15 U.S.C. § 1640(a)(2) also provides for the recovery of attorney's fees and costs for the successful plaintiff.

The finance charge in this transaction was $1395.39. Accordingly, plaintiff is entitled to recover the sum of $1000, costs and attorney's fees. Plaintiff shall within five days submit an affidavit as to his attorney's fees. Defendant shall have five days within which to respond.

This opinion shall constitute findings of fact and conclusions of law in accordance with Fed. R. Civ. P. 52.

Dated this 26th day of July, 1977.

/s/ Edward Leavy
United States Magistrate

Judgment.

In the United States District Court for the District of Oregon.

Darrell Messinger, Plaintiff, vs. Ford Motor Credit Co., a corporation, and Marv Tonkin Ford Sales, Inc., a corporation, Defendant. Civil No. 76-475.

Filed: Aug. 16, 1977.

This action came on for trial before the Court, Honorable Edward Leavy, United States Magistrate, presiding, and the issues were tried and a decision rendered.

IT IS ORDERED AND ADJUDGED that plaintiff, Darrell Messinger, recover from defendants Ford Motor Credit Co. and Marv Tonkin Ford Sales, Inc. the sum of $1000 as statutory damages, the further sum of $1000 as attorneys' fees, and his costs of action.

Dated at Portland, Oregon, this 16th day of August, 1977.

/s/ Robert M. Christ
Clerk of Court

Order.

United States District Court, District of Oregon.

Darrell Messinger, Plaintiff, vs. Ford Motor Credit Company, a corporation and Marv Tonkin Ford Sales, Inc., Defendants. Civil 76-475.

Filed: March 15, 1978.

This case was tried before Magistrate Edward Leavy on July 19, 1977 by stipulation of the parties. A decision was entered on July 26, 1977. A Judgment, signed by the Clerk of the Court was entered on August 16, 1977.

It was the intent of the parties that the Magistrate be empowered to direct entry of final judgment in this action. It now appears, however, that notwithstanding this stipulation and intention, an order of a district judge is necessary to direct entry of judgment in a case tried before a magistrate by stipulation.

Accordingly, it is ORDERED that the Clerk enter judgment as follows, *nunc pro tunc* to August 16, 1977:

> "Plaintiff recover from defendants sum of $1,000 statutory damages, + $1,000 attorneys fees, and his costs of action."

Dated: March 15, 1978.

/s/ Otto R. Skopil, Jr.
United States District Judge

APPENDIX C

United States Court of Appeals for the Ninth Circuit.

Chuck St. Germain, Plaintiff-Appellant, v. Bank of Hawaii, Defendant-Appellee. No. 76-2007.

Appeal from the United States District Court for the District of Hawaii.

Decided: December 30, 1977.

Before ELY, HUFSTEDLER and WRIGHT, Circuit Judges.

HUFSTEDLER, Circuit Judge:

The thorny question presented on this appeal is whether the Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1601, *et seq.*, requires disclosure of an acceleration clause in a retail installment contract. The district court held that disclosure was not required (*St. Germain v. Bank of Hawaii* (D.Hawaii 1976) 413 F.Supp. 587), and it granted the Bank of Hawaii's motion for summary judgment. We reverse, holding that TILA compels a creditor making a consumer loan to disclose the creditor's right to accelerate full payment of the debt upon the debtor's default or late payment.

The contract is a standard form "Retail Installment Contract (Automobile)." The face of the contract recites in simple language important rights and duties of the parties. Section four, captioned in large type "DELINQUENCIES AND OTHER CHARGES," states that the debtor will incur a 5 percent delinquency charge, plus a part of the creditor's attorney's fees and/or collector's fees in the event of default or late payment. Section three, captioned "PREPAYMENT PRIVILEGE," states that the debtor is entitled to a refund

of unearned finance charges if he pays the debt before maturity. Nothing is said about the creditor's right to accelerate if the debtor defaults or pays late nor about the possibility of any rebate of unearned finance charges if the debt is accelerated. On the back of the contract in small print, the contract says that, upon default, "the full amount hereof shall at the Seller's option be immediately due and payable and Seller shall have the rights and remedies of the holder of a retail installment contract under Chapter 476, Hawaii Revised Statutes." No reference is made to the rebate of unearned interest upon acceleration.

The question whether TILA requires disclosure of the existence and impact of an acceleration clause in a retail installment contract should have been settled early in TILA's life. Instead, the Federal Reserve Board has issued conflicting signals, and the Circuits are in disarray. The common denominators of the Board's analysis and the basis of the four divergent views of the courts are 15 U.S.C. § 1639(a)(7) (TILA § 129(a)(7)) and 12 C.F.R. § 226.8(b)(4), Regulation Z, implementing TILA. Section 1639(a)(7) provides:

> "(a) Any creditor making a consumer loan . . . shall disclose each of the following items, to the extent applicable:
>
> . . .
>
> (7) The default, delinquency or similar charges payable in the event of late payments."

Section 226.8(b), in pertinent part, states:

> "(b) In any transaction subject to this section, the following items, as applicable, shall be disclosed:

. . .

(4) The amount, or method of computing the amount, of any default, delinquency, or similar charges payable in the event of late payments."

Judicial responses to the impact of Section 226.8(b)(4) on disclosure of acceleration have split four ways. One response is that disclosure is always required because the right of acceleration is itself a "charge . . . in the event of late payments," within the meaning of TILA and Regulation Z. (*Garza v. Chicago Health Clubs, Inc.* (N.D.Ill. 1972) 347 F.Supp. 955.) After noting that neither TILA nor Regulation Z expressly defines "charge," *Garza* turned to state decisions and to Black's Law Dictionary to find the meaning of "charge." The court decided that "charge" was synonymous with "obligation," "claim," and "expenses," and it concluded:

"Considering these definitions and the purpose of the statute and regulation to inform consumers of credit costs and terms so they can effectively choose between sources of credit . . . it seems clear that the acceleration of the balance of the debt should be considered a 'charge' . . . ." (347 F.Supp. at 959.)

The "always" view enjoyed a spasm of popularity among district courts, at least until two of the better known district court decisions were overturned on appeal. (*Meyers v. Clearview Dodge Sales, Inc.* (E.D.La. 1974) 384 F.Supp. 722, *rev'd* (5th Cir. 1976) 539 F.2d 511, 519; *Johnson v. McCrackin-Sturman Ford, Inc.* (W.D.Pa. 1974) 381 F.Supp. 153, *rev'd* (3d Cir. 1975), 527 F.2d 257.)

Garza has the virtue of providing a uniform national rule which is consistent with the remedial intent of

TILA. (*See Mourning v. Family Publications Service, Inc.* (1973) 411 U.S. 356, 93 S.Ct. 1652, 36 L.Ed.2d 318; *Sellers v. Wollman* (5th Cir. 1975) 510 F.2d 119, 122; *Eby v. Reb Realty, Inc.* (9th Cir. 1974) 495 F.2d 646, 650.) The defect in *Garza* is that equating an acceleration right with the term "charge" is not consistent with the use of "charge" in the context of TILA or in Regulation Z. Thus, Section 1639(a)(7) speaks of "default, delinquency, or similar charges payable," which suggests that "charges" were intended to refer to specific monetary sums rather than an undifferentiated notion of "burden" or "obligation." (*See Johnson v. McCrackin-Sturman Ford, Inc., supra,* 527 F.2d at 266.) Similarly, Regulation Z requires the disclosure of "the amount, or method of computing the amount," of the charges payable in the event of late payment, strongly implying that charges are sums of money, and not the right to payment or to increase the annual percentage rate. Moreover, the Federal Reserve Board's official staff interpretation of TILA and Regulation Z is directly contrary to *Garza.* "[T]he mere right to accelerate contained in a contractual provision . . . is not a *charge* payable in the event of late payment." (Emphasis in original. No. FC-0054 (March 21, 1977) 5 CCH Consumer Credit Guide ¶ 31,552.) Although we are not bound by the Board's official interpretation of Regulation Z nor by a staff opinion letter, both are entitled to respect; we should follow the Board's construction "unless there are compelling indications that it is wrong." (*Moore v. Great Western Savings & Loan Ass'n* (9th Cir. 1975) 513 F.2d 688, 690.) No compelling indications of error are present.

The polar opposite of *Garza* is the view that disclosure is never required. The Fifth and Tenth Circuits have adopted the "never" view. (*Begay v. Ziems Motor Co.* (10th Cir. 1977) 550 F.2d 1244; *Martin v. Commercial Securities Co., Inc.* (5th Cir. 1976) 539 F.2d 521.)[1] These courts reasoned that Congress must not have intended to require disclosure of acceleration clauses because it said nothing expressly about them. Congressional silence about provisions as common as acceleration clauses spoke eloquently to these Circuits to evidence Congress' intent not to include them as disclosure subjects.

Congressional silence is a dubious indicium of legislative intent, especially when we are dealing with a statute like TILA, in which Congress traced very few lines on a new large canvass. Despite the lack of articulate draftsmanship, TILA manifests Congress' overriding interest in disclosure to provide consumer protection. As the Supreme Court observed in *Mourning*:

> "The hearings held by Congress reflect the difficulty of the task it sought to accomplish. Whatever legislation was passed had to deal not only with the myriad forms in which credit transactions then occurred, but also with those which would be devised in the future. To accomplish its desired objective, Congress determined to lay the structure

[1]The Fifth Circuit may be in transition because rehearing *en banc* has been ordered in *McDaniel v. Fulton National Bank of Atlanta* (5th Cir. 1976), 543 F.2d 568, in which the "never" view was reaffirmed. The *en banc* decision has not yet come down.

For further criticism of the "charge" theory, *see* Comment, *Acceleration Clause Disclosure Under the Truth in Lending Act*, 77 Colum.L.Rev. 649 (1977).

> of the Act broadly. . . ." (411 U.S. at 365, 93 S.Ct. at 1658.)

The Court explained that "[t]he Truth in Lending Act reflects a transition in congressional policy from a philosophy of 'Let the buyer beware' to one of 'Let the seller disclose.' By erecting a barrier between the seller and the prospective purchaser in the form of hard facts, Congress expressly sought 'to . . . avoid the uninformed use of credit.' 15 U.S.C. § 1601." (411 U.S. at 377, 93 S.Ct. at 1664.)

Other courts have adopted the view that disclosure of an acceleration clause is required under some circumstances. The leading proponent of the "sometimes" interpretation is the Third Circuit. The pivot of the intermediate interpretation, as in *Garza*, is the "charge" concept, but the existence of a "charge" depends upon whether the creditor retains or rebates unearned interest after acceleration. The Third Circuit holds that retained interest is a "charge," the existence of which must be disclosed, unless, under state law, the retained interest must be rebated upon acceleration. (*Johnson v. McCrackin-Sturman Ford Inc.* (3d Cir. 1975) 527 F.2d 257.)

A variation of the "sometimes" theme is that disclosure is required if the credit agreement itself fails to provide for rebating unearned interest. That interpretation was initially accepted by a few district courts in the Fifth Circuit, until the Court of Appeals reversed. (*Barrett v. Vernie Jones Ford, Inc.* (N.D.Ga.1975) 395 F.Supp. 904, 908-11, *rev'd* (5th Cir. 1976) 543 F.2d 568; *McDaniel v. Fulton National Bank of Atlanta* (N.D.Ga.1975) 395 F.Supp. 422, 425-28, *rev'd* (5th Cir. 1976) 543 F.2d 568; *see also* Galie, *The Accel-*

eration Clause as a Truth in Lending Disclosure: The End of the Dilemma?, 93 Banking L.J. 317 (1976).)

The "sometimes" interpretation does not run aground upon the textual shoal of *Garza*, nor upon the remedial difficulty with *Begay* and *Martin*. It is not satisfactory, however, because it is too narrow to be genuinely remedial; and it also conflicts with the Federal Reserve Board's interpretation of "charge." (*See* Staff Op'n Letter No. 1208 (July 6, 1977) 5 CCH Consumer Credit Guide ¶ 31,647.) The Third Circuit's addition of the state law element not only complicates the rule, but also builds into the statute and regulation a morass of conflicting and uncertain state law. (*Compare Williams v. Bill Watson Ford, Inc.* (E.D.La.1976) 423 F.Supp. 345, 350-52 (Louisiana law always requires rebate upon acceleration) with *Burley v. Bastrop Loan Co., Inc.* (W.D.La.1976) 407 F.Supp. 773 (Louisiana law provides rebate subject to additional conditions); *compare McDaniel v. Fulton National Bank of Atlanta* (N.D.Ga. 1975) 395 F.Supp. 422 (Georgia law always requires rebate) *with id.* at 424-28 (supplemental opinion) and *Barrett v. Vernie Jones Ford, Inc.* (N.D. Ga.1975) 395 F.Supp. 904 (Georgia law only provides rebates where accelerated payment of finance charges results in a rate of interest in violation of state usury law). *See also Ecenrode v. Household Finance Co. of South Dover* (D.Del.1976) 422 F.Supp. 1327, 1331-32 (Delaware law unclear).) The end product of the Third Circuit's interpretation is the disclosure of rebate confusion.[2] The result cannot be squared with congres-

[2]*E.g., Burley v. Bastrop Loan Co., Inc., supra*, 407 F.Supp. at 781. A state may obligate "the accelerating creditor to rebate the unearned interest . . . [but] this rebate is conditioned upon his filing suit to collect the obligation; the creditor has the *power*, but not the *right* to collect interest as yet unearned on the obligation." (Emphasis in original.) *See also Galie, supra*, 93 Banking L.J. at 332-33.

sional intent to require creditors to make meaningful disclosures to consumer debtors. (*See Ljepava v. M.L.S.C. Properties, Inc.* (9th Cir. 1975) 511 F.2d 935, 942; *Ecenrode v. Household Finance Co. of South Dover, supra*, 422 F.Supp. at 1331.)

The Federal Reserve Board has not resolved these conflicts; indeed, the Board has injected its own uncertainties. The Board signalled a promising beginning in October, 1974, with a Staff Opinion Letter that suggested a shift from the "charge" analysis to the "prepayment" provisions of 12 C.F.R. § 226.8(b)(7):[3]

> "For the purposes of Truth in Lending disclosures, the staff views an acceleration of payments as essentially a prepayment of the contract obligation. As such, the disclosure provisions of § 226.8(b) (7) of the Regulation, which require the creditor to identify the method of rebating any unearned portion of the finance charge or to disclose that no rebate would be made apply. If the creditor rebates under one method for acceleration and

[3]12 C.F.R. § 226.8(b)(7) provides:

> "In any transaction subject to this section the following items, as applicable, shall be disclosed:
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> . . .
>
> (7) Identification of the method of computing any unearned portion of the finance charge in the event of prepayment in full of an obligation which includes precomputed finance charges and a statement of the amount or method of computation of any charge that may be deducted from the amount of any rebate of such unearned finance charge that will be credited to an obligation or refunded to the customer. If the credit contract does not provide for any rebate of unearned finance charges upon prepayment in full, this fact shall be disclosed."

another for voluntary prepayment, both methods would need to be identified under § 226.8(b)(7). Failure to disclose the method of rebate or nonrebate would be a violation of the Truth in Lending Act."

In the next paragraph of the letter, however, the staff returned to the "charge" analysis which had occupied the attention of the courts:

"[I]f upon acceleration of the unpaid remainder of the total payments, the creditor does not rebate unearned finance charges in accordance with the rebate provisions disclosed in § 226.8(b)(7), any amounts retained beyond those which would have been rebated under the disclosed rebate provisions represent a 'charge' which should have been disclosed under § 226.8(b)(4)."

(Staff Op'n Letter No. 851 (Oct. 22, 1974), 5 CCH Consumer Credit Guide ¶ 31,173.) A later interpretation repeats the "prepayment" analysis, begun by Letter No. 851, but it does not pursue the implications of the prepayment analysis. (Staff interpretation No. FC-0054, March 21, 1977, 5 CCH Consumer Credit Guide ¶ 31,552 ("[E]arly payment of the balance . . . upon acceleration by the creditor is essentially the same as a prepayment of the obligation.")

We think that the prepayment concept is the correct analytical track. The prepayment concept is not without its own problems, but the difficulties are considerably less than those that have been encountered with the "charge" theories. The prepayment concept leads directly to the conclusion that the effect of the acceleration clause on unearned interest must be "meaningfully disclosed in the disclosure statement," a result which is

consistent both with the overriding purposes of Congress in enacting TILA and with the conclusions that we reached in *La Grone v. Johnson* (9th Cir. 1976), 534 F.2d 1360.[4] The prepayment theory also reaches the *Garza* result without the textual difficulties that *Garza* encounters with the "charge" language. We perceive no serious textual impediment to reading Section 226.8(b)(7) prepayment include involuntary prepayment (acceleration) as well as voluntary prepayment.[5] Like voluntary prepayment, acceleration occurs during the life of the loan, upon the unilateral act of one of the parties, and both forms of prepayment cause payment of the contractual indebtedness before the ultimate time fixed by the agreement. In both voluntary and involuntary prepayment, the question arises whether the debtor is entitled to a rebate of the unearned finance charges. To be sure, voluntary payment is initiated by the debtor and acceleration by the creditor, but the same problem of unearned finance charges arises in either case. The potential impact on the debtor's pocketbook is the same.

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[4]In *La Grone,* we affirmed the district court's decision that the debtor was entitled to rescind a credit transaction because the creditor had failed to disclose an acceleration clause in the disclosure statement. We assumed, without discussion, that disclosure was required. The issue that was litigated was whether disclosure in the underlying note, rather than in the specifically marked disclosure section, satisfied TILA. We held that disclosure in the note did not comply with TILA. *See also Clausen v. Beneficial Finance Co. of Berkeley* (N.D.Cal. 1976), 423 F.Supp. 985, 986, following *La Grone.*

[5]We are aware that the Fifth and Tenth Circuits have criticized the use of the prepayment concept under § 226.8 (b)(7) as also being unsupported by the precise language of the Regulation and the Act. *Begay v. Ziems Motor Co., supra,* 550 F.2d at 1249; *Martin v. Commercial Securities Co., Inc., supra,* 539 F.2d at 529.

We are required to respect the Board's construction of the statute and its own regulation, but less respect is due where, as here, the Board's views have been expressed only through unofficial staff statements rather than official interpretations. Moreover, when the Board has issued conflicting signals, we will choose the direction that makes more sense to us in trying to achieve the congressional purpose of providing meaningful disclosure to the debtor about the costs of his borrowing.[6] As we have pointed out, the charge theory, while superficially plausible, leads to confusion, and, when state law is incorporated in the "charge," the debtor is given an all points bulletin.

When we choose the Board's alternative prepayment theory, we cut a clean path through the thicket. Regulation Z, Section 226.8(b)(7), requires "[i]dentification of the method of computing any unearned portion of the finance charge in the event of prepayment in full . . . . If the credit contract does not provide for any rebate of unearned finance charges upon prepayment in full, this fact shall be disclosed." When we equate acceleration with prepayment, the disclosure obligation under Section 226.8(b)(7) is evident: The creditor must disclose whether a rebate of unearned interest will be made upon acceleration and also disclose the method by which the amount of unearned interest will be computed if the debt is accelerated.

[6]The weight accorded the informal letters of the staff of the Federal Reserve Board " 'in a particular case will depend on the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.' " *Evy v. Reb Realty, Inc.* (9th Cir. 1974), 495 F.2d 646, 649-50 n.5, *quoting Skidmore v. Swift & Co.* (1944), 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124.

The Bank of Hawaii did not make the disclosures that we hold are required under Section 226.8(b)(7).[7]

REVERSED.

[7]The failure to disclose the existence of an acceleration clause was only one of several violations of TILA alleged by plaintiff. Since multiple failures to disclose in any single credit sale transaction give rise to only one recovery (15 U.S.C. § 1640(g)) our resolution of the acceleration clause issue obviates the need to consider St. Germain's other claims.

APPENDIX D

Official Staff Interpretation No. FC-0054, 42 F.R. 18056, [1974-1977 Transfer Binder] Cons. Cred. Guide (CCH ¶31,552.

April 4, 1977

This is in reply to your letter * * * requesting official staff interpretations of the requirements of Regulation Z with regard to computation of finance charge, disclosure of late payment charges, disclosure of loan proceeds, and the meaning of the term "meaningful sequence." This letter is an official staff interpretation of these four matters.

Staff considers the three other questions raised in your letter as inappropriate for official staff interpretations at this time. An official interpretation concerning disclosure of a dealer's reserve is deemed inappropriate because the Board has proposed for comment an amendment and an interpretation of Regulation Z on this same subject. Similarly, an official interpretation concerning whether loan proceeds must be disclosed is deemed inappropriate because this question has been raised in *Pollock v. General Finance Corporation,* a case currently pending in the United States Court of Appeals for the Fifth Circuit in which the Board filed a brief *amicus curiae.* An official interpretation of your question regarding disclosure of notary fees under § 226.8(d)(3) would be inappropriate since staff's position is not one upon which a creditor may wish to rely in a civil action. A response to that issue will, therefore, be provided in a separate unofficial staff letter to you.

To answer your remaining four questions:

(1) You ask whether a creditor's *right* of acceleration upon default by the obligor must be disclosed

as a default, delinquency, or late payment charge within the context of § 226.8(b)(4). It is staff's opinion that the phrase "default, delinquency, or similar charges in the event of late payments," found in § 128(a)(9) and § 129(a)(7) of the Truth in Lending Act and § 226.8(b)(4) of Regulation Z, refers to specific sums assessed against a borrower solely because of failure to make payments when due. It is staff's opinion that the mere right to accelerate contained in a contractual provision which sets out the creditor's right to accelerate the entire obligation upon a certain event (generally the obligor's failure to make a payment when due) is not a *charge* payable in the event of late payment. Therefore, it need not be disclosed under § 226.8(b)(4).

You refer to a prior Public Information Letter, No. 851, which discusses the right of acceleration. Staff believes that letter addresses a different issue than the one posed in your letter. Staff understands that letter to say that early *payment* of the balance of a precomputed finance charge obligation by a customer upon acceleration by the creditor is essentially the same as a prepayment of the obligation. Therefore, if the creditor does not rebate unearned finance charges in accordance with the rebate provisions disclosed under § 226.8(b)(7) when the customer pays the balance of the obligation upon acceleration, any amounts retained beyond those which would have been rebated under the disclosed rebate provisions do represent the type of charge that must be disclosed under § 226.8 (b)(4).

(2) You ask a further question regarding what charges must be disclosed as default, delinquency, or late payment charges within the context of § 226.8(b)

(4). Specifically, you ask whether attorney's fees and foreclosure costs assessed on a non-automatic basis at the sole discretion of the creditor need to be disclosed pursuant to that section. It is staff's opinion that, if the imposition of these charges is automatic (for example, if the charge becomes immediately due and collectible by virtue of default), the charges must be disclosed under § 226.8(b)(4). If, however, the imposition of the charge is not automatic but is conditioned upon employment of the services of an attorney to effect collection or expenditure of amounts in conjunction with foreclosure proceedings, such charge need not be disclosed under § 226.8(b)(4).

(3) You request an official staff interpretation regarding the requirement in § 226.6(a) that disclosures be made "in meaningful sequence." Specifically, you ask whether any particular arithmetical progression must be used in making the disclosures. You refer to the case of *Allen v. Beneficial Finance Co.*, 531 F. 2d 797 (7th Cir., 1976), which has been interpreted by some to mean that the various disclosure elements must be arranged in a "summation column," as opposed to a subtractional order, to comply with the "meaningful sequence" requirement.

Section 226.6(a) does not set forth any particular arithmetical progression which must be used in making disclosures. It is staff's opinion that the regulation does not require all presentations to be made within the rigid confines of a particular series of additions or subtractions. In fact, it is inappropriate to speak of a "summation" or "subtractional" method as if these were separate and mutually exclusive methods of disclosure. In order to comply with the requirements of

§ 226.8(d), for example, most disclosure statements would necessarily contain both additions and subtractions. A disclosure might begin with a total of payments figure and subtract the amount financed to show the finance charge. The same disclosure would probably involve an addition process in disclosing the amount financed, if it includes other charges, and in disclosing the finance charge, if it contains more than one component. By contrast, a disclosure might begin with the amount of credit paid to or on behalf of the customer (a sum) and require a series of subtractions, if the transaction involves a prepaid finance charge and/or a required deposit balance, to reach the amount financed. The invalidity of attempting to characterize disclosure methods by these labels may be further illustrated by the provisions of § 226.8(c), a series of disclosure items involving a mixture of subtractions and additions which, therefore, cannot be described with a single arithmetical label.

In staff's view, the term "meaningful sequence" cannot and should not be defined by reference to some rigid concept of arithmetical progression. We believe that § 226.6(a) requires related terms to be presented in an order which will assist the customer in understanding their relationship. Given the wide variety in credit transactions, "meaningful sequence" must be determined by reference to the particular set of disclosures under consideration. An arrangement of elements suitable for one type of transaction may not necessarily be adequate for another type of transaction.

(4) You ask whether finders' fees, appraisal fees, credit report fees, and other charges of the type mentioned in § 226.4(a) which are absorbed by the creditor and which are not passed on to the obligor either

directly or indirectly (e.g., by increasing the amount financed or the rate of interest charged) must be itemized and disclosed as components of the finance charge under § 226.8(c)(8)(i) and § 226.8(d)(3). It is staff's opinion that such amounts which are absorbed by the creditor as a cost of doing business and are not directly or indirectly imposed upon the obligor do not constitute finance charges within the general definition of § 226.4(a). Since they are not part of the finance charge, they need not be itemized and disclosed under § 226.8(c) or § 226.8(d).

This letter is an official staff interpretation of Regulation Z, issued in accordance with § 226.1(d)(3) of the regulation, and limited in its application to the facts and issues presented herein. I trust it will be of assistance to you.

Jerauld C. Kluckman
Associate Director

APPENDIX E

Public Information Letter No. 851 [1974-1977 Transfer Binder] Cons. Cred. Guide (CCH) ¶31,173
October 22, 1974

This is in response to your letter of June 26, inquiring whether an acceleration clause in an instalment contract is a "charge" payable in the event of late payment within the meaning of § 226.8(b)(4) of Regulation Z and therefore must be disclosed with other required items.

For the purposes of Truth in Lending disclosures, this staff views an acceleration of payments as essentially a prepayment of the contract obligation. As such, the disclosure provisions of § 226.8(b)(7) of the Regulation, which require the creditor to identify the method of rebating any unearned portion of the finance charge or to disclose that no rebate would be made, apply. If the creditor rebates under one method for acceleration and another for voluntary prepayment, both methods would need to be identified under § 226.8(b)(7). Failure to disclose the method of rebate or nonrebate would be a violation of the Truth in Lending Act.

If, under the acceleration provision, a rebate is made by the creditor in accordance with the disclosure of the rebate provisions of § 226.8(b)(7), we believe that there is no *additional* "charge" for late payments made by the customer and therefore no need to disclose under the provisions of § 226.8(b)(4). On the other hand, if upon acceleration of the unpaid remainder of the total of payments, the creditor does not rebate unearned finance charges in accordance with the rebate provisions disclosed in § 226.8(b)(7), any amounts

retained beyond those which would have been rebated under the disclosed rebate provisions represent a "charge" which should be disclosed under § 226.8(b)(4).

Frederic Solomon,
Director

APPENDIX F

Public Information Letter No. 1208 [1974-1977 Transfer Binder] Cons. Cred. Guide (CCH) ¶31,647
July 6, 1977

This is in reply to your letter * * * requesting clarification of Official Staff Interpretation FC-0054, which discussed the right of acceleration.

In FC-0054, staff took the position that a creditor's right of acceleration upon default by the obligor need not be disclosed as a default, delinquency, or late payment charge within the context of § 226.8(b)(4). The interpretation went on to state, however, that since early payment of the balance of an obligation upon acceleration is essentially the same as voluntary prepayment, if the creditor does not rebate unearned finance charges in the former situation in accordance with the rebate provisions disclosed under § 226.8(b)(7), any extra amounts retained represent the type of charge that must be disclosed under § 226.8(b)(4).

You state that frequently a disclosure statement will include a provision concerning rebate of unearned finance charges upon prepayment, but contains no reference to the right of acceleration in the event of default. The promissory note to which the statement relates, however, often does contain an acceleration clause stating that "the entire then remaining unpaid balance hereof shall . . . be immediately due and payable . . .," making no reference to any rebate in the event of payment after acceleration. You state that some creditors have a policy of providing rebates upon early payment after acceleration, while others do not. You suggest that where the contract is silent concerning rebate upon prepayment after acceleration, it must be

assumed that such a rebate is *not* provided, and, therefore, the disclosure statement must make the § 226.8 (b)(4) disclosure discussed above.

Staff does not agree with your analysis of this situation. The fact that the contract is silent concerning rebate upon prepayment after acceleration is not determinative of the issue; the question is whether in fact the creditor does or does not rebate upon prepayment after acceleration in accordance with the rebate method shown on the disclosure statement. In this sense, then, the individual creditor's policy determines whether there is a violation of the Act and regulation.

This is an unofficial staff interpretation of Regulation Z. Although you requested issuance of an official staff interpretation, we believe that to be inappropriate in these circumstances since your question does not appear to staff to involve a technical ambiguity in the regulation.

Jerauld C. Kluckman
Associate Director

APPENDIX G

Public Information Letter No. 1324
Cons. Cred. Guide (CCH) ¶31,827
November 14, 1978

This is in response to your letter * * * in which you request an interpretation of § 226.8(b)(4) of Regulation Z, which requires disclosure of the amount or method of computing the amount of any default, delinquency, or similar charges which may be imposed in connection with a credit transaction.

Specifically, you ask whether a disclosure is required under § 226.8(b)(4) where a credit agreement gives the creditor the right, upon the customer's default, to accelerate payment of the entire indebtedness, including unearned finance charges, but State law requires a rebate of unearned finance charges in such circumstances.

Your question is answered in part by reference to Official Staff Interpretation FC-0054 and Public Information Letter 1208, copies of which are enclosed. The staff's position, as expressed in those interpretations, is that if a creditor rebates unearned finance charges in connection with prepayment upon acceleration using the same method as for voluntary prepayment and that method has been properly disclosed in accordance with § 226.8(b)(7), there is no default charge. However, any amounts retained by a creditor upon acceleration which would have been rebated under the disclosed rebate provisions would represent the type of default charge which must be disclosed pursuant to § 226.8(b)(4).

Applying the foregoing to the situation you pose, the staff believes that if a creditor in fact rebates

unearned finance charges in connection with prepayment upon acceleration in accordance wtih State law and, as a result, the customer receives the same rebate as would be received under the disclosed rebate mthod, then prepayment upon acceleration would not involve any default charge.

Conversely, any unearned finance charges retained by a creditor in connection with prepayment upon acceleration, which would not be retained under the disclosed rebate calculation method, would constitute a default charge which must be disclosed under § 226.8(b)(4). This is so whether the excess charges are retained pursuant to the creditor's apparent contract right or because the rebate method prescribed by State law results in a lesser rebate than the method disclosed.

There is an additional consideration which the staff would also call to your attention. Even where a creditor's policy is to rebate unearned finance charges in the event of prepayment upon acceleration in accordance with State law, so that no charges are retained in excess of those indicated by the disclosed rebate method, a statement in the underlying contract which apparently gives the creditor the right to retain such unearned finance charges may mislead a customer into believing that there will be no rebate upon acceleration. Such a contractual provision, if supplied to a customer with rebate method disclosure required by § 226.8(b)(7) (e.g., as part of a combined note and disclosure form or where separate note and disclosure forms are presented to the customer simultaneously), would constitute additional information within the meaning of § 226.6(c) of Regulation Z. If this additional information is misleading or confusing or contradicts, obscures, or detracts attention from the required § 226.8(b)(7) disclosure, there would be a violation of the regulation. Of course, the capacity of the additional information to mislead or confuse can only be determined by reference to all of the circumstances of a particular case.

You note that the question of disclosure of the right of acceleration has been the subject of litigation in various jurisdictions. The views expressed in this letter and the enclosed interpretations represent the staff's opinion on this issue. However, it would be advisable for creditors to be aware of court holdings in their particular jurisdiction (some of which may be contrary to the staff's position) so that they may determine the most prudent course to follow. The particular case which you cite, *McDaniel v. Fulton National Bank of Atlanta,* 571 F. 2d 948 (5th Cir. 1978), however, would appear to be consistent with the staff's views. In fact, the court in that case relied in part upon FC-0054 in reaching its decison.

This is an unofficial staff interpretation of Regulation Z, limited in its applicability to the facts and issues discussed above. If you desire further assistance, please contact this office or Mr. Richard A. Dill, Assistant Vice President, Department of Supervision and Regulation, Federal Reserve Bank of Atlanta, Atlanta, Georgia 30303.

Service of the within and receipt of a copy thereof is hereby admitted this .... day of March, A.D. 1979.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1487

FORD MOTOR CREDIT COMPANY AND
DEE THOMASON FORD,
Petitioners,
v.

DENNIS MILHOLLIN AND MICHELLE MILHOLLIN,
Respondents.

FORD MOTOR CREDIT COMPANY,
Petitioner,
v.

DONNA M. EATON,
Respondent.

FORD MOTOR CREDIT COMPANY AND
MARV TONKIN FORD SALES, INC.,
Petitioners,
v.

DARRELL MESSINGER,
Respondent.

FORD MOTOR CREDIT COMPANY AND
WEBSTER-WOLFARD FORD, INC.,
Petitioners,
v.

DAVID P. ANDRESEN,
Respondent.

BRIEF AMICI CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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BRIEF AMICI CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATEMENT OF POSITION AND INTEREST OF AMICI CURIAE

This Amici Curiae Brief is filed by National Consumer Finance Association ("NCFA"), Consumer Bankers Association ("CBA") and General Motors Acceptance Corporation ("GMAC") (herein collectively referred to as "Amici") pursuant to stipulation of counsel as provided for in Rule 42(1) of the Rules of the Supreme Court of the United States.

NCFA is the nation's largest trade association serving the consumer finance industry. Founded in 1916, the Association represents nearly 800 consumer finance and industrial banking companies operating more than 17,000 offices across the United States. Members of NCFA presently hold approximately ninety percent of the $50,000,000,000 in outstanding consumer credit of the industry. CBA is a national organization representing the consumer lending departments of approximately 325 commercial banks across the country. The members of CBA account for more than 60% of all consumer credit obligations held by commercial banks. GMAC is a credit finance institution engaged in the business of purchasing retail installment contracts from automobile dealers. GMAC conducts its operations from 398 branch offices in the United States and Canada, from which it provides financing services to over 18,400 General Motors dealers. At the present time, GMAC holds more than 4,000,000 retail installment contracts representing over $14,000,000,000 in outstanding credit.

GMAC and the members of NCFA and CBA are engaged in business in every state in the nation. A substantial portion of that business involves making consumer loans and acquiring retail installment contracts that are subject to the Federal Truth in Lending Act and Regulation Z. The decision by the Ninth Circuit

below affects every consumer loan and retail installment contract held by GMAC and the members of NCFA and CBA in the jurisdiction of the Ninth Circuit.

Amici have read the Petition for a Writ of Certiorari filed by Petitioners herein. Amici endorse all of the reasons set forth in that Petition for the granting of a writ of certiorari. Because of the far reaching consequences of the decision below, Amici have submitted this Brief to provide additional argument on the national importance of the issues raised in the Petition and the widespread confusion and uncertainty that have resulted from the conflicting opinions issued by the Circuit Courts on these issues.

GMAC and the members of NCFA and CBA are engaged in the business of making consumer loans and acquiring retail installment contracts that are subject to the Federal Truth in Lending Act and Regulation Z. GMAC and the members of NCFA and CBA have been substantially and adversely affected by the decision of the Ninth Circuit below, since that Court held, contrary to an Official Interpretation of the Federal Reserve Board and the decisions of five other Circuit Courts, that the Truth in Lending Act and Regulation Z require disclosure of the creditor's right to accelerate an indebtedness upon default by the customer.

GMAC and the members of NCFA and CBA are defendants in hundreds of lawsuits in state and federal courts across the country in which the plaintiffs have alleged that they did not properly disclose the existence of an acceleration clause under the Truth in Lending Act and Regulation Z. GMAC and the members of NCFA and CBA are adversely affected by both the proliferation of such litigation and the uncertainty created by the conflict in the Circuits on this issue.

REASONS FOR GRANTING THE WRIT

I. Introduction.

The Truth in Lending Act (15 U.S.C. §§ 1601 *et seq.*) (herein the "Act") was enacted for the purpose of assuring meaningful disclosures of credit terms so that consumers could effectively comparison shop for credit. Truth in Lending Act § 102(a) [15 U.S.C. § 1601(a)]. Rather than attempting to fulfill this purpose totally by itself, and in order to achieve a desirable degree of uniformity and flexibility, Congress articulated broad guidelines regarding the items to be disclosed and authorized the Federal Reserve Board (herein the "Board") to set forth the specific disclosures to be made. Truth in Lending Act § 105 [15 U.S.C. § 1604]. *See Mourning* v. *Family Publications Service*, 411 U.S. 356, 365 (1973).

Pursuant to this authority, the Board promulgated Regulation Z (12 C.F.R. § 226). Building upon the Congressional guidelines set forth in the Act, the Board assembled a detailed list of the specific disclosures to be made. Regulation Z thus became the technical guideline for preparation of the meaningful disclosure statement mandated by the Act.

Although Regulation Z sets forth detailed and specific disclosure requirements, it has not proven to be sufficiently specific to eliminate a multitude of interpretive questions that have arisen concerning the disclosure requirements of the Act and Regulation. In an effort to promote a uniform interpretation of the Act and Regulation Z that creditors can rely upon in drafting disclosure forms, the Board has issued both formal and informal interpretations of the Act and Regulation Z relating to their application to a variety of practical factual problems. Creditors have drafted printed disclosure forms in conformity with those interpretations that have been used in the millions of consumer credit transactions that are consummated each year.

Despite this effort by the Board to promote uniformity and to provide creditors with compliance guidelines, the federal and state courts have been besieged with litigation brought under the Truth in Lending Act. Since 1972, over eleven thousand cases have been brought in the federal courts alone alleging violations of the Act.[1] In many of these cases, highly technical and debatable violations have been alleged;[2] and disclosure forms have often been challenged even where they were drafted in strict conformity with the Board's interpretive guidelines.

The enormous volume of litigation has often resulted in conflicting decisions as to the disclosure requirements of the Act and Regulation Z. This conflict has also been spawned by the tendency of some courts to ignore or pay little deference to the views of the Board and to substitute judicial notions of what disclosures ought to be required for the clear requirements of the Act and Regulation Z.

This case presents a graphic illustration of the intolerable chaos and confusion that can result from such an *ad hoc* judicial approach to the disclosure requirements of Regulation Z. Section 128(a)(9) of the Act and Section 226.8(b)(4) of Regulation Z require a creditor to disclose any "default, delinquency, or similar charges

[1] Administrative Office of the United States Courts, Annual Reports, 1976, 1978.

[2] Under the Act, civil liability is imposed upon the creditor if even only one violation is found. Truth in Lending Act § 130(a) [15 U.S.C. § 1640(a)]. This liability is imposed without regard to whether the violation was intentional and without regard to whether the debtor suffered any damages. This penal characteristic of the Act has been largely responsible for the thousands of cases that have been brought, many asserting novel and strained interpretations of the Act and Regulation Z.

payable in the event of late payments." Section 226.8(b)(7) of Regulation Z, which has no counterpart in the Act, requires the disclosure of the method by which any unearned portion of the finance charges will be rebated to the consumer when the contract is prepaid in full. Because of confusion and uncertainty over whether these sections of the Act and Regulation Z require any disclosure where a consumer credit contract contains an acceleration clause, the Board issued an Official Staff Interpretation of Regulation Z on March 21, 1977.[3] In that Official Interpretation, the Board stated that the presence of an acceleration clause in a consumer credit contract need not be disclosed provided that the creditor rebates unearned finance charges upon a payment of the indebtedness following acceleration in accordance with its disclosed rebate method for voluntary prepayment. This Official Interpretation represents a reasonable construction of the Act and Regulation Z and has been relied upon by creditors in drafting disclosure forms used in countless millions of consumer credit transactions.

Despite this clear Board position stated in an Official Interpretation, the United States Courts of Appeals for six different Circuits have ruled upon the disclosure requirements applicable to an acceleration clause and have failed to reach a consensus. As accurately and succinctly stated in the Petition for a Writ of Certiorari filed in this case:

> "The Board's position has been rejected by the Ninth and Tenth Circuits, partially rejected by the Fifth Circuit, and partially followed by the Third, Fifth, and District of Columbia Circuits. The Ninth Circuit has rejected decisions by the Third, Fifth and Tenth Circuits; the Eighth Circuit has rejected the approach of both the Ninth and the Fifth Circuits;

[3] Official Staff Interpretation No. FC-0054, 42 F.R. 18056, [1974-1977 Transfer Binder] Cons. Cred. Guide ¶ 31,552, April 4, 1977.

> the Tenth Circuit has rejected the views of the Third Circuit; and the Fifth Circuit has issued six separate, internally conflicting opinions." [4]

The Ninth Circuit's decision rejecting the Board's Official Interpretation of its own Regulation was premised in part upon the Court's mistaken view that the interpretation it was rejecting was unofficial [*St. Germain* v. *Bank of Hawaii*, 573 F.2d 572, 576 (9th Cir. 1977)] and in part upon the Court's obvious policy conclusion that acceleration clauses are important and ought to be disclosed in all cases. In order to implement this judicial policy, the Court held that an acceleration of an indebtedness is itself a prepayment of the indebtedness that must be disclosed in all cases under Section 226.8(b)(7) of Regulation Z. This radical, unprecedented and illogical holding came as a complete surprise to the consumer credit industry. If the decision of the Court is permitted to stand, disclosure forms drafted in careful compliance with the Board's interpretive guidelines and used in millions of consumer credit transactions will be summarily invalidated.

As a direct result of this conflict and confusion in the Circuits, the federal and state courts will be deluged with more needless and wasteful litigation as trial courts across the land attempt to sort out the conflicting positions of the Circuits that have ruled on this important question and as additional Circuits offer their own interpretations of the Act and Regulation Z. This Court should intervene in order to resolve the irreconcilable conflict between the Circuits and to confirm the proper weight to be given the Regulations and interpretations of the Federal Reserve Board so that creditors can

[4] Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, at p. 10, Ford Motor Credit Company and Dee Thomason Ford v. Dennis Milhollin and Michelle Milhollin, filed March 27, 1978, Docket No. 78-1487.

comply with the exacting requirements of the Act and Regulation Z.

II. The Petition for a Writ of Certiorari Should Be Granted to Settle Substantial and Recurring Questions As to the Weight to Be Given Federal Reserve Board Interpretations of Regulation Z.

The informed judgment of the Board in construing the Act has been accorded substantial weight by this Court:

> ". . . To accomplish its desired objective, Congress determined to lay the structure of the Act broadly and to entrust its construction to an agency with the necessary experience and resources to monitor its operation. Section 105 delegated to the Federal Reserve Board broad authority to promulgate regulations necessary to render the Act effective." *Mourning* v. *Family Publications Service*, 411 U.S. 356, 365 (1973).

This Court has also noted that the deference to be afforded an agency's interpretation is even greater when the agency is interpreting its own regulation rather than a statute. *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965). In *Bone* v. *Hibernia Bank*, 493 F.2d 135 (9th Cir. 1974), this special deference was upheld by the Ninth Circuit in the specific context of Section 226.8(b)(7) of Regulation Z:

> "Great deference is especially due the Federal Reserve Board's construction of its own Regulation Z because of the important interpretive and enforcement powers granted this agency by Congress under the Truth in Lending Act." 493 F.2d at 139.

Thus, an additional measure of deference should be given to the Board's interpretation of its own Regulation, and, absent compelling indications of error, a court should follow the Board's interpretation.

Judicial deference to the Board's statutory and regulatory interpretations is an essential element in the fair and efficient administration and enforcement of the Act. Through the exercise of its broad responsibilities under the Act, the Board has gained valuable experience and developed a unique level of technical expertise and understanding of the policy considerations underlying the Act:

> "We believe that it is precisely these kinds of policy decisions about the disclosure statement, requiring the weighing and balancing of the various available choices, that Congress entrusted to the Federal Reserve Board by granting it such broad powers. The conclusions thus reached by the Board are based upon its specialized experience and access to information, which is not likely to come to the attention of a particular judge in a given case." *Bone* v. *Hibernia Bank, supra*, 493 F.2d at 140.

Respect for the Board's view is also necessary in order to insure uniformity in the disclosures made by creditors, which is vital to the fulfillment of the purposes of the Act. A set of disclosure requirements, interpreted and applied uniformly, will provide a single form of disclosure that consumers can become familiar with and understand.

The need for a uniform interpretation of the disclosure requirements of the Act and Regulation Z is also grounded in concepts of fairness to creditors who must comply with the Act and the Regulation or be subject to severe penalties, including potentially enormous class action claims.[5] Printed forms that conform with the

[5] If a violation of the Act or Regulation Z is found, the creditor is liable for double the amount of finance charges imposed in the consumer credit transaction with a minimum liability of $100 and a maximum liability of $1,000. In a class action, the creditor's liability can be as high as $500,000 or 1% of the creditor's net worth, whichever is less. Truth in Lending Act § 130(a) [15 U.S.C. § 1640(a)]. In an effort to soften these severe civil liability pro-

Federal Reserve Board interpretations have been developed by creditors who have attempted in good faith to comply with the Act and the Regulation. These forms have been used in the literally millions of consumer credit transactions that are entered into each year. Absolute chaos will result if courts "second-guess" the Federal Reserve Board and adopt a construction of the Act or the Regulation that is inconsistent with a Board interpretation that is not plainly erroneous. Creditors attempting in good faith to comply with the law could place no confidence in the Board's uniform guidelines offered to assist them and instead would be subject to the vagaries of conflicting and unpredictable interpretations of the Act and the Regulation by trial and appellate courts across the land.

A final reason for giving special deference to the interpretations of the Board is to curb the flood of needless and costly litigation that has been prompted by the willingness of trial and appellate courts to ignore the Board's compliance guidelines and adopt new and novel disclosure rules designed to further a judicial disclosure policy not expressed in either the Act or Regulation Z.

This rule of special deference to Board interpretations has applicability here since the Official Interpretation in question was a Board Interpretation of Section 226.8 (b)(7) of Regulation Z dealing with prepayment disclosures. Section 226.8(b)(7) has no counterpart in the Act. The Ninth Circuit, ignoring its own admonitions in *Bone* v. *Hibernia Bank, supra,* rejected the Board's Official Interpretation of its own Regulation and construed Regulation Z in a manner that no creditor could

visions, the Act was amended in 1976 to provide that the civil liability provision does not apply to any act done or omitted in good faith and in conformity with any rule, regulation or interpretation thereof by the Board even if the rule, regulation or interpretation is thereafter rescinded or declared invalid. Truth in Lending Act § 130(f) [15 U.S.C. § 1640(f)].

reasonably have anticipated. The Ninth Circuit held that acceleration of an indebtedness is itself a prepayment of the indebtedness so that Section 226.8(b)(7) of Regulation Z "compels a creditor making a consumer loan to disclose the creditor's right to accelerate . . . ." *St. Germain* v. *Bank of Hawaii,* 573 F.2d 572, 573 (9th Cir. 1977). *Accord, Milhollin* v. *Ford Motor Credit Co.,* 588 F.2d 753, 758 (9th Cir. 1978). This decision by the Court conflicts with the Board's Official Interpretation and the views of five other Circuits and defies logic and common sense. Acceleration is the antithesis of prepayment since acceleration occurs only when the debtor has *failed* to pay the indebtedness. As a result of these decisions by the Ninth Circuit, disclosure statements prepared in good faith by creditors attempting to comply with the many complex and technical requirements of the Act and Regulation Z have been thrown into violation of the Act.

Although the Ninth Circuit was undoubtedly of the view that acceleration clauses ought to be disclosed, it was not within the province of the Court to impose or create such a requirement where both the Act and Regulation Z are silent. As the Eighth Circuit recently noted with respect to this very issue:

> "Defendants' disclosure statement fully complies with the Act and Regulation Z in describing the method of rebate in the event of prepayment. Regulation Z, fairly read, requires only the disclosure of the consequences of prepayment, not the effect of the exercise of a right to accelerate. In our judgment, no such additional disclosure requirement is either explicit or implicit in the language of the Regulation. To the extent the absence of such a disclosure requirement may be perceived by the courts as a hole in the regulatory matrix, only the Federal Reserve Board is authorized to fill the hole. It is for the Board itself, not the courts, to assess the

potential impact of the exercise of the right of acceleration upon the credit customer and on the basis thereof to determine whether to explicitly expand the existing disclosure requirements. We are unwilling to usurp the prerogatives of the Board." *Griffith* v. *Superior Ford,* 577 F.2d 455, 459 (8th Cir. 1978).

Where, as here, a creditor complies in good faith with all of the requirements of the Act and Regulation Z as reasonably interpreted by the Federal Reserve Board, the creditor should not be subjected to liability upon the basis of a questionable theory that finds no textual support in the Act or Regulation Z. In a highly regulated area such as this, creditors should be allowed to rely upon the unambiguous requirements of the Act and Regulation Z. This Court has an opportunity in this case to confirm this basic principle in the context of issues that affect the entire consumer credit industry and virtually every consumer credit transaction.

III. The Petition Should Be Granted to Resolve the Conflict in the Circuits and Establish a Uniform Rule With Respect to the Disclosure of Acceleration Clauses.

The acceleration issue has been treated by six different Circuit Courts of Appeals. As Petitioners correctly point out, a different rule of compliance has been produced in nearly every one of these Circuits. This divergence of opinion is the most extreme and serious conflict among the Circuits to arise under the Truth in Lending Act.[6]

[6] The Circuits have also reached conflicting results on the question of whether joint debtors in a single transaction are each entitled to the statutory penalty where a violation is found. The Ninth Circuit in this very case pointed to this conflict and held that only one recovery is permitted for a single violation:

"The circuits have split on this issue. The Fifth and Seventh Circuits have concluded that a husband and wife as joint obligors are entitled to separate recoveries. *Davis* v. *United Companies Mortgage & Inv. of Gretna, Inc.*, 551 F.2d 971 (5th Cir. 1977); *Mirabal* v. *General Motors Acceptance Corp.*, 537 F.2d 871, 881-83 (7th Cir. 1976); *Allen* v. *Beneficial Finance Co. of Gary*, 531 F.2d 797, 805-06 (7th Cir.), cert. denied, 429 U.S. 885, 97 S.Ct. 237, 50 L.Ed.2d 166 (1976). The Fourth Circuit reached the opposite result in *Powers* v. *Sims and Levin*, 542 F.2d 1216, 1219-20 (4th Cir. 1976), in which the court limited the recovery of husband and wife as joint obligors to one penalty.

We believe that the Fourth Circuit's approach more closely reflects the intent of Congress." *Milhollin* v. *Ford Motor Credit Company*, 588 F.2d 753, 758 (9th Cir. 1978).

The uncertainty and lack of uniformity in the Circuits has caused considerable problems for consumers and creditors alike. For the consumer, the split in the Circuits has resulted in confusion since disclosures by creditors are no longer uniform, thus defeating the purpose of the Act to permit consumers to comparison shop for credit.

For the creditor, the lack of uniformity between the Circuits has resulted in a perplexing dilemma. Many institutional creditors, such as GMAC and the members of NCFA and CBA, engage in business in every state in the nation. Despite certain local variations, the disclosure statements used by these creditors have maintained a high degree of uniformity. As a result of the conflict in the Circuits on the acceleration issue, creditors doing business on a nationwide basis may no longer employ uniform disclosure statements under the Act and Regulation Z. This is best illustrated in the case of Petitioner Ford Motor Credit Company which has prevailed in two Circuits, yet lost in a third, on substantially the same disclosure statement. *Compare Johnson* v. *McCrackin-Sturman Ford, Inc.*, 527 F.2d 257 (3d Cir. 1975) and *Griffin* v. *Superior Ford*, 577 F.2d 455 (8th Cir. 1978), *with Milhollin* v. *Ford Motor Credit Co.*, 588 F.2d 753 (9th Cir. 1978). Indeed, it is conceivable that a creditor could deliver a disclosure state-

ment that complies with the Act and Regulation Z in the Circuit in which the transaction was consummated and yet be held liable for a violation of the Act and Regulation Z because an action is brought by a consumer in a Circuit adopting a contrary rule.[7]

The Circuits have had more than ample time to reconcile their conflicting decisions. It is apparent that the passage of time alone will not alleviate the problem and will, in all likelihood, aggravate the conflict. This case is therefore ripe for a decision from this Court.

CONCLUSION

For the above reasons, Amici Curiae respectfully urge this Court to grant the Petition for a Writ of Certiorari to review the opinion and judgment of the Ninth Circuit below.

DATED: April 19, 1979.

Respectfully submitted,

VERNON L. EVANS
DREW V. TIDWELL
RENE RAMIREZ

Counsel for Amici Curiae
National Consumer Finance Association,
Consumer Bankers Association and
General Motors Acceptance Corporation

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[7] This is not merely a hypothetical possibility since debtors often change their state of residence during the term of a consumer credit transaction.

JOINT APPENDIX

IN THE

Supreme Court of the United States

October Term, 1979

No. 78-1487

FORD MOTOR CREDIT COMPANY, *et al.*,

Petitioners,

—*v.*—

DENNIS MILHOLLIN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 27, 1979

CERTIORARI GRANTED JUNE 18, 1979

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FORD MOTOR CREDIT COMPANY
v.
DONNA M. EATON

FORD MOTOR CREDIT COMPANY and DEE THOMASON FORD v. DENNIS MILHOLLIN and MICHELLE MILHOLLIN

RELEVANT DOCKET ENTRIES

April 15, 1975	Complaint filed
June 13, 1975	Answer of Ford Motor Credit Co. filed
June 16, 1975	Answer of Dee Thomason Ford Co. filed
August 8, 1975	Ford Motor Credit Co.'s Answers to Interrogatories filed
October 20, 1975	Motion of Plaintiffs for Summary Judgment filed
October 20, 1975	Affidavit of Dennis Millhollin and Michelle Millhollin filed
November 21, 1975	Motion of Ford Motor Credit Co. for Summary Judgment filed
November 21, 1975	Affidavit of L. B. Plummer filed
December 5, 1975	Motion of Dee Thomason Ford Co. for Summary Judgment filed
December 15, 1975	Record of hearing on Plaintiffs' Motion for Summary Judgment and Ford Motor Credit Co.'s Motion for Summary Judgment; Order taking under advisement
December 19, 1975	Affidavit of Peter J. Deckers filed
December 22, 1975	Record of hearing on Dee Thomason Ford Co.'s Motion for Summary Judgment; Order taking under advisement
April 7, 1976	Recommendation and Order, denying Defendants' Motions for Summary Judgment and granting

	Plaintiffs' Motion for Summary Judgment, filed
April 14, 1976	Motion of Ford Motor Credit Co. for Reconsideration filed
April 19, 1976	Motion of Dee Thomason Ford Co. for Reconsideration filed
May 3, 1976	Record of hearing on Ford Motor Credit Co.'s Motion for Reconsideration; Order taking under advisement
May 24, 1976	Record of hearing on Dee Thomason Ford Co.'s Motion for Reconsideration; Order taking under advisement
June 25, 1976	Order denying Defendants' motions to modify and/or vacate judgment filed and entered
June 25, 1976	Summary Judgment for Plaintiffs in sum of $1,000.00 general damages and $750.00 attorney's fees filed and entered
June 25, 1976	Order setting Plaintiffs' attorney's fees at $750.00 filed and entered
July 21, 1976	Notice of Appeal by Defendants filed
August 3, 1976	Notice of Cross Appeal by Plaintiffs filed
March 29, 1978	Order consolidating appeals filed
December 28, 1978	Opinion filed and Judgment filed and entered
June 26, 1979	Supreme Court Order of June 18, 1979 granting certiorari filed

COMPLAINT TO ENFORCE CIVIL LIABILITY UNDER TRUTH IN LENDING ACT

(Filed April 15, 1975)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DENNIS MILLHOLLIN and MICHELLE MILLHOLLIN,

Plaintiffs,

vs.

FORD MOTOR CREDIT CO., a corporation, and DEE THOMASON FORD, a corporation,

Defendants.

CIVIL ACTION NO. 75-334

COMPLAINT

COUNT I

1. This is an action for money damages. This complaint is filed and these proceedings are instituted under the Truth in Lending Act, 15 U.S.C.A. Section 1601 et seq (hereinafter called "Act") to recover statutory damages, reasonable attorney's fees, and costs of suit by reason of the defendants' violation of the Act and Federal Reserve Regulation Z, 12 C.F.R. Section 226 (hereinafter called "Regulation Z"), adopted by the Board of Governors of the Federal Reserve System pursuant thereto. The jurisdiction of this Court is invoked pursuant to Section 130(e) of the Act, 15 U.S.C.A., Section 1640(e), and 28 U.S.C.A. Section 1337.

2. The plaintiffs, DENNIS MILLHOLLIN and MICHELLE MILLHOLLIN, are natural persons, both residing at 3727 S.E. 162nd., Portland, Oregon 97236.

3. The defendant, FORD MOTOR CREDIT CO., is a foreign corporation engaged in the business of financing automobile purchases at 4309 N.E. Tillamook, P.O. Box 13070, Portland, Oregon. At all times relevant hereto, defendant FORD MOTOR CREDIT CO. in the ordinary course of its business, regularly extended, offered to extend, arranged and offered to arrange the extension of consumer credit, for which a finance charge is or may be imposed, or which is payable in more than four (4) installments.

4. The defendant, DEE THOMASON FORD, is an Oregon corporation engaged in the business of selling automobiles at 309 South State Street, Lake Oswego, Oregon. At all times relevant hereto, the Defendant DEE THOMASON FOOD [*sic*] in the ordinary course of its business, regularly extended, offered to extend, arranged and offered to arrange the extension of consumer credit, for which a finance charge is or may be imposed, or which is payable in more than four (4) installments.

5. On or about July 12, 1974, Plaintiff DENNIS MILLHOLLIN entered into a consumer credit transaction with Defendants, which transaction consisted of the purchase from Defendant DEE THOMASON FORD of a 1973 Ford Pinto Wagon, for a cash price of $3,098.00, a finance charge of $711.84, a total of payments of $3,084.64, and a deferred payment price of $3,984.64. This purchase was financed in the regular course of business by Defendant FORD MOTOR CREDIT CO., and the contract evidencing this purchase was assigned to Defendant FORD MOTOR CREDIT CO. in the regular course of business.

6. A true and accurate copy of the contract evidencing this purchase is attached hereto, marked "Plaintiffs' Exhibit A," and by this reference is incorporated herein.

7. In the course of this transaction, Defendants violated the provisions of §121 of the Act, 15 U.S.C.A. §1631, and §226.8 and §226.6 of Regulation Z, in the following respects:

a) By failing to clearly identify on the front of the contract FORD MOTOR CREDIT CO. as a creditor in the transaction, as required by §226.6(d) and §226.8(a) of Regulation Z.

b) By failing to disclose on the front of the contract that the Defendants had the option of declaring the entire unpaid balance of the contract immediately due and payable in the event of a default or late payment by the Plaintiffs, as required by §128(a)(9) of the Act, 15 U.S.C.A. §1638(a)(9), and §226.8(a) and §226.8(b)(4) of Regulation Z.

c) By failing to disclose clearly and conspicuously and in a manner which did not mislead, confuse or contradict, that Plaintiffs were required to obtain Physical Damage Insurance, as required by 15 U.S.C.A. §1631(a) and §226.4(a)(6), §226.6(a) and §226.6(c) of Regulation Z.

d) By failing to describe or identify the type of security interest retained or acquired by Defendant FORD MOTOR CREDIT CO., as required by §128(a)(10) of the Act, 15 U.S.C.A. §1638(a)(10) and §226.8(b)(5) of Regulation Z.

8. As a result of the aforesaid violations of the Act, the Defendants are liable to Plaintiff DENNIS MILLHOLLIN in the sum of $1,000.00, plus costs and reasonable attorney's fees, as provided by Section 130(a) of the Act, 15 U.S.C.A. §1640(a).

COUNT II

9. Plaintiffs incorporate the allegations in paragraphs 1, 2, 3, 4, 6 and 7 above, with the same force and effect as if herein set forth.

10. On or about July 12, 1974, Plaintiff MICHELLE MILLHOLLIN entered into a consumer credit transaction with Defendants, which transaction consisted of the purchase of a 1973 Ford Pinto Wagon from Defendant DEE THOMASON FORD for a cash price of $3,098.00, a finance charge of $711.84, a total of payments of $3,084.64, and a deferred payment price of $3,984.64. This purchase was financed in the regular course of business by Defendant FORD MOTOR CREDIT CO., and the contract evidencing this purchase was assigned to Defendant FORD MOTOR CREDIT CO. in the regular course of business.

11. As a result of the aforesaid violations of the Act, the Defendants are liable to Plaintiff MICHELLE MILLHOLLIN in the sum of $1,000.00, plus costs and a reasonable attorney's fee, as provided by Section 130(a) of the Act, 15 U.S.C.A. §1640(a).

WHEREFORE, Plaintiffs pray as follows:

a) that in regard to Plaintiff DENNIS MILLHOLLIN, pursuant to §130(a) of the Truth in Lending Act, judgment be entered in his favor and against the Defendants, and each of them, in the sum of $1,000.00;

b) that in regard to Plaintiff MICHELLE MILLHOLLIN, pursuant to §130(a) of the Truth in Lending Act, judgment be entered in her favor and against the Defendants, and each of them, in the sum of $1,000.00; and

c) for reasonable attorney's fees as provided for under §130(a) of the Truth in Lending Act; for costs; and for such other and further relief as may be just and proper.

LEGAL AID SERVICE—Multnomah
Bar Association, Inc.
By: /s/ Richard A. Slottee
RICHARD A. SLOTTEE
Of Attorneys for Plaintiffs

8-9

OR[illegible]ON AUTOMOBILE RETAIL INSTALMENT CONTRACT Date 7-12-74

Buyer (and Co-Buyer) - Name and Address (Include County and Zip Code)
T[illegible]rris Millhollin
16900 SE Alder
Portland, Oregon 97233

ACCOUNT NO.
Seller, Name and Address
Dee Thomason Ford
309 S. State
Lake Oswego, Oregon

Buyer (which means the undersigned Buyers and Co-Buyers, jointly and severally) having been quoted both a deferred payment price and a lesser cash price hereby purchases from Seller on a time price basis, upon the terms and conditions set forth on the face and reverse sides hereof, the following property (hereinafter called the "Property") delivery and acceptance of which in good order hereby are acknowledged by Buyer.

New or Used	Year and Make	Series	Body Style	No. Cyl.	If Truck Ton Capacity	Manufacturer's Serial Number	Use For Which Purchased
Used	1973 Ford	Pinto	WAG	4		3R12X140838	☐ Personal ☐ Agriculture ☐ Business ☐

INCLUDING: ☐ Radio ☐ Air Conditioner ☐ Automatic Transmission ☐ Power Steering ☐ Power Brakes ☐ Power Seats ☐ Power Windows ☐

DESCRIPTION OF TRADE IN

1966 Ford (Year and Make) $ 300.00 (Gross Allowance)
— (Serial Number) $ -0- (Amount Owing)

OPTIONAL INSURANCE

Buyer authorizes Seller to obtain the following insurance coverages:

(a) Physical Damage Insurance: Coverages checked below for a term of [illegible] months (or for such shorter term as the insurer to whom Seller shall apply therefor will provide for the amount included herein) from the date hereof covering accidental physical damage to the Property based on actual cash value at the time of loss not to exceed policy limits payable to Buyer or Seller as interests may appear.

☐ Comprehensive ☐ Fire-Theft & Combined Additional Coverage $ ____ (a)

☐ $____ Deductible Collision ☐ Towing & Labor Costs ($25.00 Limit)

(b) Credit Life Insurance on the life of Dennis Millhollin (Insured Person) for the term of this contract.

☐ Provided under Ford Life Insurance Company's Group Policy No. 2200 in accordance with the "Credit Life Insurance Eligibility" section below.

Insured Buyer's Age 19

☐ Provided by Central States in accordance with the separate Application, Notice, Certificate or Policy delivered to Buyer on this date. $ 55.53 (b)

(c) Credit Accident and Health or Disability Insurance on Dennis Millhollin (Insured Person) for the term of this Contract.

Provided by ____ in accordance with the separate Application, Notice, Certificate or Policy delivered to Buyer this date. $ 117.27 (c)

(d) Other Optional Insurance ____ (describe) $ -- (d)
Provided by ____
for a term of ____ months.
Total Cost of Optional Insurance .... $ 172.80

NOTICE TO BUYER: (1) You are not required to obtain the Credit Life and/or Credit Accident and Health or Disability Insurance for which a charge is indicated above and such is not a factor in the Seller's approval of this credit. (2) You have the right to choose the person through whom the Physical Damage Insurance required under this contract is to be obtained. ACKNOWLEDGING the foregoing, BUYER requests and authorizes SELLER to obtain each insurance coverage for which an amount is included above.

X Dennis Millhollin 7-12-74

(Sale of insurance to be included only if signed by or [illegible] Insured Buyer and dated)

LIABILITY INSURANCE COVERAGE FOR BODILY INJURY AND PROPERTY DAMAGE CAUSED TO OTHERS IS NOT INCLUDED.

CREDIT LIFE INSURANCE ELIGIBILITY
Credit life insurance under Ford Life Insurance Company's Group Policy No. 2200 is available only on the life of one natural person who is obligated to make payments under this retail instalment instrument and who is under the age of 66 on the date hereof. Benefits will be limited to a refund of premiums if there is no person eligible for such insurance, or if death results from suicide within two years from the date hereof. For details see Notice of Proposed Group Credit Life Insurance on reverse side of Buyer's Copy.

The foregoing contract hereby is accepted by the Seller and assigned to Ford Motor Credit Company in accordance with the terms of the Assignment set forth on the reverse side hereof.

Seller: Dee Thomason Ford
By F.H. Adams Title Mgr

DETAILS OF TRANSACTION

(1) Cash Price $ 3098.00 (1)
Cash Down Payment $ 400.00 — 200.00 Due 8-12-74
Trade In (See Opposite) $ 300.00
(2) Total Down Payment $ 900.00 (2)
(3) Unpaid Balance of Cash Price (Difference between Items 1 & 2) $ 2198.00 (3)
(4) Other Charges
Optional Insurance (See Opposite) $ 172.80
Official Fees $ —
Taxes (Not included in Cash Price) $ —
License, Title & Registration Fees $ 2.00
Total Other Charges $ 174.80 (4)
(5) Unpaid Balance – Amount Financed $ 2372.80 (5)
(6) FINANCE CHARGE $ 711.84 (6)
(7) ANNUAL PERCENTAGE RATE 17.52 % (7)
(8) Total of Payments (Sum of Items 5 & 6) $ 3084.64 (8)
(9) Deferred Payment Price (Sum of Items 1, 4 & 6) $ 3984.64 (9)
(10) Payment Schedule: Buyer hereby agrees to pay to Seller the Total of Payments (Item 8 above) in 35 monthly instalments of $ 85.68 each and one final instalment of $ 85.84 on the like day of each month commencing 8-29 1974, or, if no date is specified, one month after the date of this contract, plus a pickup payment of $ 200.00 on which no finance charge is assessed, due on 8-12-74, 19__
(11) Balloon Payment(s) $200 on 8-12-74 $ ____ on ____ (Insert amount of each payment that is more than twice the amount of any otherwise regularly scheduled equal payment)
A balloon payment may be refinanced only upon such terms and conditions as the then parties to this contract may agree as of its due date.
(12) Delinquency Charges: Buyer hereby agrees to pay a delinquency charge on each instalment in default for more than 10 days in the amount of 5% thereof or $5.00, whichever is less, plus such expenses incurred by Seller in effecting collection hereunder as may be allowed by law.
(13) Security Interest: Seller shall have a security interest under the Uniform Commercial Code in the Property (described above) and in the proceeds thereof to secure the payment in cash of the Total of Payments and all other amounts due or to become due hereunder.
(14) Prepayment Rebate: Buyer may prepay his obligations under this contract in full at any time prior to maturity of the final instalment hereunder, and, if he does so, shall receive a rebate of the unearned portion of the Finance Charge computed under the sum of the digits method after first deducting an acquisition fee of $15.00. No rebate will be made if the amount is less than $1.00.
(15) Additional Terms and Conditions: The additional terms and conditions set forth on the reverse side hereof are a part of this contract and are incorporated herein by reference.

NOTICE TO THE BUYER
Do not sign this contract before you read it or if it contains any blank space except that if delivery of the vehicle is to be made to you after this contract is signed, the serial number or other identifying information and the due date of the first instalment may be filled in at the time of delivery.
You are entitled to a copy of this contract.
You have the right to pay off in advance the full amount due and to obtain a partial refund of the finance charge.
Buyer acknowledges receipt of a true and completely filled in copy of this RETAIL INSTALMENT CONTRACT.

Buyer: X Dennis M. Millhollin
Co-Buyer: Michelle L. Millhollin

FOR SELLER'S USE ONLY

10

ADDITIONAL TERMS AND CONDITIONS

16. ASSIGNMENT
The original Seller may assign this contract and his assignee shall acquire all of his interest in this contract and the Property and shall be entitled to all the rights and privileges of Seller hereunder. After Buyer receives notice of any such assignment, Buyer shall make all payments hereunder directly to the holder hereof and the original Seller shall not be the agent of the holder for transmission of payments or otherwise. Buyer shall not transfer or otherwise dispose of any interest in this contract or the Property.

17. USE OF PROPERTY – WARRANTIES
Buyer shall keep the Property free from all encumbrances, and any amount that may be paid by Seller in release or discharge thereof shall be paid by Buyer to Seller forthwith upon demand with interest at the highest lawful contract rate. Buyer shall not use the Property illegally, improperly or for hire (unless stated herein) and shall not remove the Property from the county of his residence without the written permission of Seller. No representation, promise or warranty, express or implied, has been made with respect to the merchantability, suitability or fitness for purpose of the Property or otherwise unless the same is endorsed hereon in writing or is contained in a separate written instrument signed by the original Seller. Buyer will settle directly with the original Seller all claims concerning the Property or its use or operation.

18. RISK OF LOSS – INSURANCE
The Property shall be at Buyer's risk. Buyer shall obtain and maintain at his own expense for so long as any amount remains unpaid hereunder insurance protecting the interests of Buyer and Seller against loss, damage or destruction of or to the Property in such forms and amounts as Seller may require. The inclusion of a charge for insurance herein shall not relieve Buyer of such obligation but only authorizes Seller to attempt to obtain the requested coverages on Buyer's behalf through an authorized agent; provided, if Seller is unable to obtain the requested coverages for the term indicated for the amount included herein, Seller may (i) obtain such coverages for such term, if any, as the insurance carrier to whom Seller shall apply therefor will provide for such amount, or (ii) credit such amount to the final maturing instalments hereunder in inverse order of maturity or as otherwise required by law.

If Buyer fails to obtain or maintain such insurance, or fails to furnish satisfactory evidence thereof upon request, Seller may, but shall not be required to, and without prejudice to his rights hereunder if he does not, obtain such insurance protecting either the interests of Buyer and Seller or the interests of Seller only. In such event, Buyer agrees to reimburse Seller for the cost thereof forthwith upon demand together with interest thereon at the highest lawful contract rate.

Buyer hereby assigns to Seller any monies payable under such insurance, by whomever obtained, including returned or unearned premiums, and Seller hereby is authorized on behalf of both Buyer and Seller to receive or collect same, to endorse checks or drafts in payment thereof, to cancel such insurance or to release or settle any claim with respect thereto. The proceeds from such insurance, by whomever obtained, shall be applied toward replacement of the Property or payment of the indebtedness hereunder in the sole discretion of Seller.

19. DEFAULT
Time is of the essence of this contract. In the event Buyer defaults in any payment, or fails to obtain or maintain the insurance required hereunder, or fails to comply with any other provision hereof, or a proceeding in bankruptcy, receivership or insolvency shall be instituted by or against Buyer or his property, or Seller deems the Property in danger of misuse or confiscation, or Seller otherwise reasonably deems the indebtedness or the Property insecure, Seller shall have the right to declare all amounts due or to become due hereunder to be immediately due and payable and Seller shall have all the rights and remedies of a Secured Party under the Uniform Commercial Code, including the right to repossess the Property wherever the same may be found with free right of entry, and to recondition and sell the same at public or private sale. Upon request, Buyer shall deliver the Property to Seller at a place designated by Seller. Seller shall have the right to retain all payments made prior to repossession and Buyer shall remain liable for any deficiency to the extent permitted by law. Any personalty in or attached to the Property when repossessed may be held by Seller without liability and Buyer shall be deemed to have waived any claim thereto unless written demand by certified mail is made upon Seller within 24 hours after repossession. Buyer agrees to pay reasonable attorneys' fees (15% if permitted by law) and other expenses incurred by Seller in effecting collection, repossession or resale hereunder. Seller's remedies hereunder are in addition to any given by law and may be enforced successively or concurrently. Waiver by Seller of any default shall not be deemed a waiver of any other default.

20. GENERAL
No transfer, renewal, extension or assignment of this contract or any interest hereunder, and no loss, damage or destruction of or to the Property, shall release Buyer from his obligations hereunder. This contract constitutes the entire agreement between the parties and no modification hereof shall be valid in any event, and Buyer expressly waives the right to rely thereon, unless made in writing signed by Seller. Any provision of this contract prohibited by applicable law shall be ineffective to the extent of such prohibition without invalidating any other provision of this contract. This contract shall be governed by the laws of the state in which the original Seller is located as shown on the face of this contract.

GUARANTY

For Value Received, each of the undersigned guarantors, jointly and severally, guaranties the prompt and unconditional payment, performance and discharge of all Buyer's obligations under the within contract and covenants that in the event of default in any of said obligations thereunder, to pay upon demand the full amount remaining unpaid thereunder together with a reasonable attorney's fee (15% of the amount then due, or if prohibited, the amount permitted by law) if placed with an attorney for collection. The liability of undersigned shall not be affected by any extension, renewal or other change in the time of payment of the said contract, or any change in the manner, place or terms of payment thereof, or the release, settlement or compromise of or with any party liable for the payment thereof, or the release or non-perfection of any security thereunder. The holder of the within contract shall not be bound to exhaust its recourse against Buyer or any other person or any security the holder may at any time have before being entitled to payment from the undersigned hereunder. Each of the undersigned guarantors hereby waives notice of the acceptance of this guaranty, and of presentment, demand and protest and notices of non-payment and dishonor, and any other demands and notices required by law, and waives all setoffs and counterclaims.

Guarantor ____ Address ____
Guarantor ____ Address ____

ASSIGNMENT

The Seller named on the face of this contract sells, assigns, and transfers to Ford Motor Credit Company (hereinafter called "Ford Credit") his, its or their entire right, title and interest in and to the within contract and the Property described therein and authorizes Ford Credit to do every act and thing necessary to collect and discharge obligations arising out of or incident to said contract and assignment. In order to induce Ford Credit to accept assignment of the contract, the Seller warrants that: the contract, and guaranty if any, are genuine, legally valid and enforceable and arose from the sale of said Property; said Property is as represented to the Buyer named therein who was quoted both a deferred payment price and a lesser cash price; the within contract was complete in all respects and Seller made all disclosures required by law prior to the execution thereof by Buyer; the Buyer is not a minor, has capacity to contract and paid the down payment stated in the contract with his own funds; all statements made by or on behalf of the Buyer and furnished to Ford Credit by the Seller are true to the best of the Seller's knowledge and belief and the Seller has no knowledge of any fact that would impair the validity or value of the contract; title to said Property is vested in the Seller free of all liens and encumbrances and the Seller has the right to assign said title; and a certificate of title to said Property showing a lien or encumbrance for the benefit of Ford Credit or the Seller has been or will be applied for forthwith if permitted by law. If there is any breach of any of the foregoing warranties, without regard to the Seller's knowledge or lack of knowledge with respect thereto or Ford Credit's reliance thereon, the Seller hereby agrees unconditionally to purchase said contract from Ford Credit, upon demand, for the full amount then unpaid whether said contract shall then be, or not be, in default. Seller further agrees that in event Buyer or any other person makes a claim against Ford Credit alleging facts which, if true, would constitute a breach of any of the foregoing warranties, Seller shall assume the defense of such claim and shall indemnify and save Ford Credit harmless from all loss, cost and expenses arising therefrom. In addition, this assignment includes the provisions of the paragraph initialed by the Seller below, provided, that if none of the paragraphs below has been initialed by Seller, this assignment shall include the provisions of the paragraph below and entitled "Repurchase." The liability of the Seller shall not be affected by any extension, renewal or other change in the time of payment of the said contract, or any change in the manner, place or terms of payment thereof, or the release, settlement or compromise of or with any party liable for payment thereof or the release or non-perfection of any security thereunder. Ford Credit shall not be bound to exhaust its recourse against the Buyer or any other person or security Ford Credit may at any time have before being entitled to payment from the Seller hereunder. The Seller waives notice of the acceptance of this assignment and notices of non-payment and non-performance of the contract and any other notices required by law and waives all setoffs and counterclaims. This assignment shall become effective upon delivery of the within contract to Ford Credit or upon Ford Credit's payment of the purchase price therefor whichever first occurs.

☐ Initial — "WITHOUT RECOURSE" The assignment of said contract [illegible] shall be without recourse [illegible] the Seller, except as otherwise provided by the terms of the Ford Motor Credit Company Retail Plan in effect at the time this assignment is accepted.

☐ Initial — "REPURCHASE" The Seller guarantees payment of the full amount [illegible] under said contract, and covenants if default be made in payment of any instalment thereunder to pay the full amount then unpaid to Ford Credit upon demand except as otherwise provided by the terms of the Ford Motor Credit Company Retail Plan in effect at the time this assignment is accepted.

☐ Initial — "LIMITED REPURCHASE" The Seller guarantees payment of the full amount remaining unpaid under said contract, and covenants if default be made in payment of any instalment thereunder to pay the full amount then unpaid to Ford Credit upon demand except as otherwise provided by the terms of the Ford Motor Credit Company Retail Plan in effect at the time this assignment is accepted provided, that if the Buyer satisfactorily pays each of the first ____ instalments coming due under the within contract this assignment shall thereafter be without recourse against the Seller, except as otherwise provided by the terms of the Ford Motor Credit Company Retail Plan in effect at the time this assignment is accepted.

☐ Initial — "PARTIAL GUARANTY" Notwithstanding the terms of the Ford Motor Credit Company Retail Plan, the Seller unconditionally guaranties payment of the full amount remaining unpaid under said contract, and agrees to purchase said contract from Ford Credit upon demand for the full amount then unpaid whether said contract shall then be, or not be, in default, provided, however, at the time of any such demand by Ford Credit, Seller may, at his election, pay to Ford Credit the sum of $ ____ in consideration of being released from such guaranty obligation, and in such event, the assignment of said contract is without recourse against the Seller, except as otherwise provided by the terms of the Ford Motor Credit Company Retail Plan in effect at the time this Assignment is accepted.

☐ Initial — "FULL GUARANTY" Notwithstanding the terms of the Ford Motor Credit Company Retail Plan, the Seller unconditionally guaranties payment of the full amount remaining unpaid under said contract, and agrees to purchase said contract from Ford Credit, upon demand, for the full amount then unpaid whether said contract shall then be, or not be, in default.

ANSWER OF FORD MOTOR CREDIT CO.

(Filed June 13, 1975)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
(Title Omitted in Printing)

COUNT I

1. Admits that this action purports to be for money damages and purports to be filed under the Truth in Lending Act, 15 USCA, Section 1601 et seq., purportedly to recover statutory damages, reasonable attorney's fees and costs by reason of alleged violations of the Act and Federal Reserve Regulation Z, 12 CFR Section 226; and admits the jurisdiction of the court purports to be invoked pursuant to Section 130(e) of the Act, 15 USCA, Section 1640(e), and 28 USCA, Section 1337.

2. Admits paragraph 2.

3. Admits that defendant Ford Motor Credit Co. is a foreign corporation and that it maintains an office at 4309 N. E. Tillamook, P. O. Box 13070, Portland, Oregon; and denies the remainder of paragraph 3.

4. Admits that defendant Dee Thomason Ford is an Oregon corporation engaged in the business of selling automobiles at 309 S. State Street, Lake Oswego, Oregon; and denies the remainder of paragraph 4.

5. Admits that on or about July 12, 1974 plaintiff Dennis Millhollin purchased from defendant Dee Thomason Ford a 1973 Ford Pinto Wagon with cash price of $3,098, a finance charge of $711.84, a total of payments of $3,084.64 and deferred payment price of $3,984.64; and admits that the contract evidencing the purchase was assigned by defendant Ford Motor

Credit Co. in the regular course of business; and denies the remainder of paragraph 5.

6. Admits paragraph 6.

7. Denies paragraph 7.

8. Denies paragraph 8.

COUNT II

9. Except as admitted hereinabove, denies each and every allegation of paragraphs 9, 10 and 11.

FIRST DEFENSE

10. Plaintiffs' Complaint fails to state facts sufficient to constitute a claim for which relief can be granted.

/s/ Dezendorf, Spears, Lubersky & Campbell
Herbert H. Anderson
John M. Berman

DEZENDORF, SPEARS, LUBERSKY & CAMPBELL
Herbert H. Anderson
John M. Berman
Attorneys for Defendant
Ford Motor Credit Co.

(Affidavit of Mailing Omitted in Printing)

ANSWER OF DEFENDANT DEE THOMASON FORD CO.

(Filed June 16, 1975)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

(Title Omitted in Printing)

Defendant, Dee Thomason Ford Co., for its answer alleges:

I.

Admits paragraph II and paragraph VI; and admits that the defendant, Ford Motor Credit Co., is a foreign corporation and that it maintains an office at 4309 N.E. Tillamook, Post Office Box 13070, Portland, Oregon; that defendant Dee Thomason Ford Co. is an Oregon corporation engaged in the business of selling automobiles at 390 South State Street, Lake Oswego, Oregon, and that on or about July 12, 1974 plaintiff Dennis Milhollin and plaintiff Michelle Milhollin purchased a 1973 Pinto Wagon pursuant to a retail installment contract of the same date, a true copy of which is attached as Exhibit "A" to plaintiff's complaint.

II.

Except as expressly admitted herein, Defendant Dee Thomason Ford Co. denies each and every other allegation contained in plaintiffs' complaint and the whole thereof.

FIRST DEFENSE.

I.

Plaintiffs' complaint fails to state facts sufficient to constitute a claim for which relief can be granted.

KEANE, HAESSLER, HARPER, PEARLMAN and COPELAND
By /s/ Michael J. Esler
Michael J. Esler
Of Attorneys for Defendant, Dee Thomason Ford Co.

(Certificate of Mailing Omitted in Printing)

FORD MOTOR CREDIT CO.'S ANSWERS TO INTERROGATORIES

(Filed August 8, 1975)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

(Title Omitted in Printing)

Defendant Ford Motor Credit Co. answers the interrogatories served upon it by plaintiffs as follows:

* * *

INTERROGATORY NO. 4: Has any contract signed by either plaintiff been assigned to you?

a. Please state the date of assignment of each contract.

b. Please state the name and address of each assignor and each assignee on each contract.

c. Please state the consideration for each assignment on each contract.

d. Please state the name and address of the present custodian of the assignment of each contract.

e. Please describe any agreement between you and any other person pursuant to which any contract signed by either plaintiff was assigned.

ANSWER TO INTERROGATORY NO. 4: Yes.

a. July 12, 1974 (only known account)

b. Assignor: Dee Thomason Ford
309 South State Street
Lake Oswego, Oregon

Assignee: Ford Motor Credit Company
Portland, Oregon

c. Sight draft dated July 15, 1974—$2,572.80

d. Dee Thomason Ford

e. Dee Thomason Ford assigns contracts to this defendant pursuant to the terms set forth in the booklet entitled "Automotive Finance Plans For Ford Motor Credit Dealers" and supplemental operations bulletins. Copies are available for inspection and copying at plaintiffs' convenience upon reasonable notice.

INTERROGATORY NO. 5: Please itemize all payments paid on the contracts involved in the transaction, whether paid to you or to any assignor, and state the date of each payment, the amount of each payment, the person who made the payment, and the person or firm that received the payment.

ANSWER TO INTERROGATORY NO. 5: Attached hereto as Exhibit B is a payment summary of those payments payments received by Ford Credit. Ford Credit's records do not reflect who made each contract payment. According to the contract, a $400 cash downpayment was made at the signing of the contract, and $300 was allowed for a trade-in. An additional $200 downpayment was to be made on or before August 12, 1974, and was made on August 12, 1974. Ford Credit was paid $200 by the dealer on that date.

* * *

INTERROGATORY NO. 14: Please state whether the automobile purchased by plaintiffs was repossessed. If so:

a. Please identify the name and address of the person or Company who repossessed the automobile.

b. Please identify the name and address of the person who authorized the repossession.

c. Please state the date of the repossession.

ANSWER TO INTERROGATORY NO. 14: Yes.

a. Ford Motor Credit Company, 2309 N. E. Tillamook, Portland, Oregon

b. Same as subparagraph "a" above.

c. February 21, 1975

INTERROGATORY NO. 15: If the answer to the previous Interrogatory is yes, please indicate the term of the contract authorizing the repossession.

a. Please state the reasons for the repossession.

ANSWER TO INTERROGATORY NO. 15: Section 19 of Additional Terms and Conditions of the Contract.

a. Default in payment of instalments due under the contract; failure to supply evidence of insurance; Ford Credit deemed the indebtedness and the property insecure.

* * *

INTERROGATORY NO. 20: Subsequent to the date of the repossession, did either plaintiff contact FORD MOTOR CREDIT and offer to pay the delinquency payments under the contract for return of the automobile. If so:

a. Please state the date of such contact.

b. Please identify who was contacted.

c. Please state the substance of the response of FORD MOTOR CREDIT to such offer.

ANSWER TO INTERROGATORY NO. 20. By letter dated February 21, 1975, Richard A. Slottee, on behalf of plaintiffs, stated that he spoke with Mr. Peter Deckers on February 21, 1975 and offered on their behalf to pay the delinquent amount, which he stated was

$171.36. To the best of this defendant's present knowledge, that is correct. According to Mr. Slottee's letter, Mr. Deckers advised that the balance owing had been accelerated and that plaintiffs should immediately attempt to refinance the vehicle. To the best of this defendant's present knowledge, that is correct. A similar conversation occurred between Mr. Slottee and Mr. Ted Haines at about the same time.

INTERROGATORY NO. 21: Please state the amount FORD MOTOR CREDIT required plaintiffs to pay to obtain possession of the automobile, subsequent to the date of the repossession.

a. Please itemize the components of such amount.

b. Please identify any other action required of the plaintiffs prior to obtaining possession of the automobile.

ANSWER TO INTERROGATORY NO. 21: The balance owing to pay off the contract was $2,440.42 and payment of that sum was the only condition to obtain possession of the vehicle. That sum was composed of unpaid principal balance of $2,406.19; late charges of $9.73; and repossession expense of $24.50.

* * *

STATE OF OREGON, County of Multnomah—ss.

I, L. B. PLUMMER, being first duly sworn, depose and say that I am the Branch Manager of Ford Motor Credit Co.; that I have read the foregoing Answers

to Interrogatories; and that the contents thereof are true and correct as I verily believe.

/s/ L. B. Plummer
L. B. Plummer
(Jurat Omitted in Printing)

/s/ Dezendorf, Spears, Lubersky & Campbell,
Herbert H. Anderson
John M. Berman

DEZENDORF, SPEARS, LUBERSKY & CAMPBELL
Herbert H. Anderson
John M. Berman
Attorneys for Defendant
Ford Motor Credit Company

(Exhibit A to Ford Motor Credit Co.'s Answers to Interrogatories Omitted in Printing)

Exhibit B to Ford Motor Credit Co.'s Answers to Interrogatories

DATE PAYMENT RECEIVED	AMOUNT
8/12/74	$200.00
8/26/74	85.68
11/19/74	85.68
12/ 2/74	85.68
12/16/74	85.68

(Certificate of Mailing Omitted in Printing)

AFFIDAVIT

(Filed October 20, 1975)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

(Title Omitted in Printing)

STATE OF OREGON, County of Multnomah—ss.

DENNIS MILLHOLLIN and MICHELLE MILLHOLLIN, each being first duly sworn, depose and say:

That DENNIS MILLHOLLIN and MICHELLE MILLHOLLIN are presently husband and wife, and were husband and wife at the time the purchase of the automobile was made as alleged in the complaint on file herein.

That on July 12, 1974 we purchased a 1973 Ford Pinto automobile from DEE THOMASON FORD. That pursuant to this purchase, we signed a retail installment contract, a true copy of which was attached to the complaint filed herein. We were both present at the time of the purchase and at the time of signing the contract.

That the automobile purchased from DEE THOMASON FORD was purchased for our personal use and for non-business purposes.

That we made payments on said contract of $200.00 on August 12, 1974, $85.68 on August 26, 1974, $85.68 on November 19, 1974, $85.68 on December 2, 1974, and $85.68 on December 16, 1974. That we did not purchase physical damage insurance for the automobile, nor were we notified that such insurance must be purchased.

That on February 21, 1975 the automobile which we purchased from DEE THOMASON FORD was repossessed. That on February 21, 1975 we contacted defendant FORD MOTOR CREDIT CO. and offered to pay the delinquent amount of $171.36. That we were informed that the balance owing on the contract had been accelerated and that the automobile would be released only upon payment of the sum of $2,440.42.

/s/ Dennis Millhollin
Dennis Millhollin

/s/ Michelle Millhollin
Michelle Millhollin

(Jurat Omitted in Printing)

(Certificate of Mailing Omitted in Printing)

AFFIDAVIT

(Filed November 21, 1975)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

(Title Omitted in Printing)

STATE OF OREGON, County of ....—ss.

I, L. B. Plummer, being duly sworn depose and say:

1. I am the Branch Manager of the Portland branch of defendant Ford Motor Credit Company.

2. In the event Ford Motor Credit Company decides to accelerate the balance owed as a result of the default of a contract purchaser, it always computes the interest rebate the same as it would compute it if the contract purchaser voluntarily prepaid the contract, as set forth in paragraph 14 on the face of the contract.

/s/ L. B. Plummer
L. B. Plummer

(Jurat Omitted in Printing)

(Affidavit of Mailing Omitted in Printing)

AFFIDAVIT

(Filed December 19, 1975)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

(Title Omitted in Printing)

STATE OF OREGON, County of Multnomah—ss.

I, Peter J. Deckers, being duly sworn depose and say:

1. I am an employee of Ford Motor Credit Co. and was responsible for the account of Dennis and Michelle Milhollin.

2. Prior to the execution of the Retail Installment Contract, Michelle Milhollin completed a Customer Statement to Ford Motor Credit Co. The purpose of that statement was to cause Ford Credit to purchase the Retail Installment Contract from Dee Thomason Ford. Attached hereto as Exhibit A is a true and correct copy of that Customer Statement.

3. As noted on the Customer Statement and on the Retail Installment Contract, the Milhollins elected to obtain their own insurance.

4. By letter dated 7-15-74, Ford Credit asked plaintiffs to supply certain information concerning their physical damage insurance. Attached hereto as Exhibit B is a true and correct copy of that letter.

5. On or about 7-17-74, Ford Credit attempted to verify that the Milhollins had obtained insurance through Elite Insurance. It was advised that Elite Insurance only insured motorcycles. Ford Credit was then advised that insurance would be obtained through Farmers Insurance Group. Attached hereto as Exhibit

C is a true and correct copy of the record of Ford Credit so indicating.

6. Thereafter a follow-up letter was sent requesting information concerning said insurance. Attached hereto as Exhibit D is a true and correct copy of that letter.

7. On or about 9-25-74, Ford Credit again attempted to confirm that plaintiffs had obtained insurance. Attached hereto as Exhibit E is a true and correct copy of the Company's records indicating that such verification could not be obtained.

8. On or about 10-4-74 Ford Credit obtained single interest insurance to protect its own interest. By letter dated 10-4-74 it so notified plaintiffs. Attached hereto as Exhibit F is a true and correct copy of that letter.

9. From the date the second payment was due, 9-29-74, plaintiffs were in default on their payments. The last payment received was received on 12-16-74.

10. On 10-23-74 Ford Credit was advised that plaintiffs had separated and Mrs. Milhollin was in Wisconsin with the vehicle. Upon further investigation, Ford Credit was advised that plaintiffs were not separating and that Mrs. Milhollin would return to Portland.

11. On at least 10 separate dates, employees of Ford Credit attempted by telephone to contact plaintiffs both in Portland and in Milwaukee, Wisconsin, in order to obtain payment to bring the contract current and to determine whether or not insurance had been obtained. So far as I recall, the Milhollins did not initiate any contacts with Ford Credit to explain their default or to advise how they intended to cure same.

12. On 2-20-75, Ford Credit again attempted to verify the insurance coverage claimed to have been obtained by plaintiffs. Ford Credit was advised that there was no insurance coverage because the premiums had never been paid. Attached hereto as Exhibit G is a true and correct copy of Ford Credit's records so indicating.

13. The decision to accelerate the balance owing and not to reinstate the contract was based on the history of extensive collection efforts involved, and the fact that plaintiffs appeared to be unable or unwilling to make the contract payments or to purchase insurance to protect the public, themselves or Ford Credit.

14. To the best of my knowledge, at no time did plaintiffs ever express any surprise that Ford Credit had purchased their contract, or that they were no longer dealing with Dee Thomason Ford. Plaintiffs made the monthly payments which they actually made, directly to Ford Credit.

/s/ Peter J. Deckers
Peter J. Deckers

(Jurat Omitted in Printing)

(All Exhibits to Affidavit Omitted in Printing)

(Affidavit of Mailing Omitted in Printing)

RECOMMENDATION AND ORDER

(Filed April 7, 1976)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DENNIS MILHOLLIN and
MICHELLE MILHOLLIN,
Plaintiffs,

vs.

FORD MOTOR CREDIT CO., a
corporation, and DEE THOMASON
FORD, a corporation,
Defendants.

Civil No. 75-334

This is an action for money damages brought under the Truth in Lending section of the Consumer Credit Protection Act, 15 U.S.C. § 1601, *et seq.*, for alleged violations of the Truth in Lending Act ("Act"), and Federal Reserve Board Regulation Z ("Reg. Z"), 12 C.F.R. § 226, *et seq.* Jurisdiction is conferred by 15 U.S.C. § 1640(e).

In July of 1974, plaintiffs, Dennis and Michelle Milhollin, purchased a 1973 Ford Pinto automobile from defendant Dee Thomason Ford on a deferred payment plan. The purchase price was $3,098.00 and the deferred payment price $3,983.64. Plaintiffs put down a cash payment of $400.00 and were allowed a $300.00 trade-in allowance on their old automobile. Additionally, a $200.00 balloon payment to be made August 12, 1974, further increased the down payment to a total of $900.00. The sum of $2,372.80 was financed at an annual percentage rate of 17.91%.

After the $200.00 balloon payment, plaintiffs were to pay 35 monthly installments of $85.68 each and one final installment of $85.84 commencing on August 29, 1974. Because plaintiffs did not maintain property damage insurance on the automobile, the assignee of the purchase contract, defendant Ford Motor Credit Company ("FMCC"), obtained this insurance and added the premium to the principal. This resulted in the payments due being increased to $94.61 per month beginning with the December 29, 1974, payment.

FMCC, without notification to the plaintiffs, repossessed the automobile on February 21, 1975. FMCC gives as reasons for repossession: (a) default in payment of installments due under the contract (two payments were overdue); (b) failure to supply evidence of insurance; and (c) FMCC deemed the indebtedness and property "insecure." FMCC's answer to plaintiffs' interrogatory 15.

By letter dated the same day as the repossession, February 21, 1975, plaintiffs, through their attorney, offered to pay the delinquent amount. FMCC responded that it had elected to accelerate the amount due. This acceleration had the effect of forcing plaintiffs to pay $2,440.42 rather than the overdue amount in order to redeem the automobile. Plaintiffs were not able to make the payment, and the Pinto was re-sold.

Plaintiffs allege that the contract violated the Act and Reg. Z in four particulars:

(1) Failure to disclose the acceleration clause on the face of the contract;

(2) Failure to disclose clearly and conspicuously that plaintiffs were required to obtain physical damage insurance on the automobile;

(3) Failure to clearly identify FMCC as a creditor on the face of the contract;

(4) Failure to describe or identify the type of security interest retained or acquired by FMCC. *Each* plaintiff seeks the maximum allowable damages of $1,000.00.

All parties move for summary judgment. Fed. R. Civ. P. 56. I find that there is no genuine and material issue of fact in dispute.[1] Therefore, this matter is ripe for summary judgment.

I. WAS FMCC A "CREDITOR"?

FMCC contends that it is not subject to the Act or Reg. Z for any violations contained in the contract in that, with regard to this transaction, it is not a "creditor" within the meaning of the statute and regulations. It maintains that assignees were not specifically made subject to the Act until October 28, 1974 (after the contract in issue was executed). Act of Oct. 28, 1974, Pub. L. 93-495, Title IV, § 413(a), 88 Stat. 1520, *adding* 15 U.S.C. § 1614. Therefore, FMCC's argument continues, it could not have been subject to the Act prior to the enactment of § 1614.

[1]Dee Thomason contends that its attempted good faith compliance with the Act and Reg. Z is a valid defense here, and, in any event, the factual issues of good faith and alleged oral disclosures made to the plaintiff preclude summary judgment. A recent 10th Circuit case, *Redhouse v. Quality Ford Sales, Inc.*, 511 F.2d 230 (10th Cir. 1975), is cited by Dee Thomason for the proposition that damages are improper in Truth in Lending Act cases where the debtor is supplied with full disclosure, be it on the face of the contract or oral. Insofar as *Redhouse* can be read as holding good faith, oral disclosure, or lack of damage causation to be defenses to violations of the Act or Reg. Z, I respectfully must disagree. I find nothing in the statute or its legislative history which suggests that any standard other than strict liability should be applied.

Plaintiffs counter with the assertion that FMCC was the true creditor in this transaction, and Dee Thomason was merely a "conduit." Thus, FMCC would have been subject to the Act as a "creditor" even before the enactment of § 1614.

I agree with the plaintiffs. The conduit approach has been applied in many analogous situations before the enactment of § 1614.[2] Here, at the same time as the sale of the automobile, and in the same transaction, Dee Thomason arranged for the extension of credit by FMCC, and assigned the purchase contract to FMCC. The transaction involving Dee Thomason and FMCC was undertaken pursuant to the usual business practices of defendants in regularly arranging for the extension of credit to consumers. That this was the usual business practice of Dee Thomason and FMCC is evidenced by the following facts: (a) The contract was printed by defendant FMCC, naming FMCC as the assignee; (b) In 1974, Dee Thomason assigned 345 such contracts to FMCC; (c) FMCC financed substantially all of the retail installment contracts signed with Dee Thomason; and (d) The assignments were made pursuant to instructions contained in a booklet issued by FMCC. FMCC's answers to plaintiffs' interrogatories 4, 26 and 27.

Additionally, it should be noted that the terms of the Act itself would seem to apply to FMCC here,

[2]See, e.g., *Johnson v. Johnson*, IV CCH Consumer Credit Guide ¶ 98,556, II Poverty Law ¶ 21,220 (M.D. Ga. 1975); *Meyers v. Clearview Dodge Sales, Inc.*, 384 F. Supp. 722 (E.D. La. 1974); *Philbeck v. Timmers Chevrolet, Inc.*, 361 F. Supp. 1255 (N.D. Ga. 1973), *rev'd on other grounds*, 499 F.2d 971 (5th Cir. 1974); *Garza v. Chicago Health Clubs, Inc.*, 347 F. Supp. 955 (N.D. Ill. 1972); *Joseph v. Norman's Health Club, Inc.*, 336 F. Supp. 307 (E.D. Mo. 1971).

even without the judicially engrafted "conduit theory." Section 103(f) of the Act, 15 U.S.C. § 1601(f) defines a creditor as one who:

> [R]egularly extend[s], or arrange[s] for the extension of, credit for which the payment of a finance charge is required, whether in connection with loans, sales of property or services, or otherwise. The provisions of this subchapter apply to any such creditor, irrespective of his or its status as a natural person or any type of organization.

I conclude, therefore, that, with respect to the transaction at issue here, FMCC is a creditor within the meaning of the Act.[3]

II. DISCLOSURE OF THE ACCELERATION CLAUSE

The Act requires that the creditor must disclose "the default, delinquency, or similar charges payable in the event of late payments." 15 U.S.C. § 1639(a)(7). Plaintiffs contend that the right of acceleration constitutes a "charge" within the meaning of section 1639(a)(7), and must be disclosed on the face of the contract.

Plaintiffs and FMCC have both provided excellent briefs to the court on this issue. Ample authority supports the position that an acceleration clause is a "charge." Ample authority also supports the position that where, as here, only accrued interest becomes due in case of acceleration, the acceleration clause is not a "charge." I feel compelled both by *stare decisis* and logic to follow Judge Skopil's ruling in *Woods v. Beneficial Finance Co. of Eugene,* 395 F. Supp. 9 (D.Or.

[3]This holding is, of course, limited to the facts of this case.

1975). The duty to disclose and fully explain any right of acceleration was made clear in *Woods.* That duty, however, is prospective in this District from the date of the *Woods* decision, February 14, 1975. 395 F. Supp. at 16. Since the transaction in issue took place before *Woods,* there was no duty at that time upon either Dee Thomason or FMCC to disclose the acceleration clause.[4]

III. DISCLOSURE OF THE INSURANCE REQUIREMENT

Plaintiffs maintain that since failure to obtain property damage insurance on the automobile can result in default and acceleration, it also constitutes a "charge" under section 1639(a)(7), and must be disclosed.

Although plaintiffs' argument is somewhat plausible, it is rejected for two reasons:

(1) 12 C.F.R. § 226.4(a)(6), which sets forth the physical damage insurance disclosure requirements (these being in conjunction with disclosures for the determination of the finance charge), has been complied with. Just above the buyer's signature by which Mr. Milhollin acknowledged his desire to obtain life and disability insurance in connection with the contract appears the notice:

> (2) You have the right to choose the person through whom the Physical Damage Insurance *required* under this contract is to be obtained. (Emphasis added).

(2) No authority is cited in support of the proposition that FMCC's decision to take out insurance on

[4]Plaintiffs' suggestion that the defendants' duty after the *Woods* decision was to change those contracts previously entered into is, to say the least, unrealistic.

the automobile because of plaintiffs' failure to do so constitutes a "charge" within the meaning of 15 U.S.C. § 1639(a)(7).

IV. CLEAR IDENTIFICATION OF FMCC

Section 226.6(b) of Reg. Z provides:

> If there is more than one creditor in a transaction, *each creditor* shall be clearly identified and shall be responsible for making only those disclosures required by this part which are within his knowledge and purview of his relationship with the customer. (Emphasis added).

Section 226.8(a) provides:

> All of the disclosures shall be made together on either
>
> (1) the note or other instrument evidencing the obligation on the same side of the page and above or adjacent to the place for the customer's signature; or
>
> (2) one side of a separate statement which identifies the transaction.

The only reference to FMCC on the face of the contract is one sentence in quite small type just above the place for the *seller's* signature. This sentence states: "The foregoing contract hereby is accepted by the Seller and assigned to Ford Motor Credit Company in accordance with the terms of the Assignment set forth on the reverse side hereof." Dee Thomason Ford, on the other hand, is identified at the top of the face of the contract in rather large writing.

FMCC has not been identified clearly within the meaning of Reg. Z. In a situation such as this where the true creditor is a credit company, that entity should be clearly identified so that the debtor knows whom

or what he is doing business with. I must assume that the only reason for placing FMCC's name in small type on the face of the contract in an obscure place is that, hopefully at least, the debtor will fail to read this provision. It is not too much to ask that the true creditor be identified in the same manner the seller is.

V. DESCRIPTION OF SECURITY INTEREST

By virtue of the terms of the purchase contract, FMCC took a security interest in the Pinto automobile when the contract was executed. This security interest was perfected the same date as the sale by notation on the certificate of title. ORS 79.3020(1)(d). The disclosure with regard to this security interest states the following:

> (13) Security Interest: Seller shall have a security interest under the Uniform Commercial Code in the Property (described above) and in the proceeds thereof to secure the payment in cash of the Total of Payments and all other amounts due or to become due hereunder.

Section 226.8(b)(5) provides that the required disclosures must include:

> A description or identification of the type of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, and a clear identification of the property to which the security interest relates or, if such property is not identifiable, an explanation of the manner in which the creditor retains or may acquire a security interest in such property which the creditor is unable to identify. . . . If after-acquired property will be subject to the security

interest, or if other or future indebtedness is or may be secured by any such property, this fact shall be clearly set forth in conjunction with the description or identification of the type of security interest held, retained or acquired.

The defendants' disclosure of their security interests fail to comply with Reg. Z. First, there is no indication that any security interest is held by FMCC.

Secondly, the "description" of the type of security interest held by FMCC and Dee Thomason amounts to little more than a statement that "a security interest under Oregon law" is retained by the seller. (The Uniform Commercial Code is codified at ORS 71.1020, *et seq.*). It should be noted that *Woods* held that the *incorrect* disclosure that the security interest involved covered after-acquired consumer goods was a violation of Reg. Z. At the least, defendants should have disclosed the *type* of security interest retained under the UCC.[5] Otherwise, a consumer might easily be misled as to his rights in the collateral.

Thirdly, the language "and all other amounts due or to become due hereunder" is, as was the language in *Woods,* surplusage which could be confusing not only to a consumer, but to an attorney as well. Is this meant to be cross-collateral clause,[6] or merely

[5]This is not to require, as FMCC suggests, that an index of the types and qualities of different security interests possible under the UCC must be disclosed. Something more than the brief statement that "a security interest under the Uniform Commercial Code" is required, however.

[6]For an example of this type of financing arrangement, see *Williams v. Walker-Thomas Furniture Co.,* 350 F.2d 445 (D.C. Cir. 1965).

It is doubtful that a cross-collateral clause was intended in this transaction where only a single automobile was purchased. The language which describes the security interest does not, however, alleviate the confusion.

a statement that add-ons (such as the insurance premiums in this case) also shall become secured? The generality of the language produces uncertainty.

FMCC would be wise to heed the recent statement of Judge Solomon with regard to language used by insurance companies in their policies:

> Insurance companies could prepare policies in clear, simple and precise language which would inform insureds of the limits of their coverage. Insurance companies could avoid the risk of ambiguity if they use short and precise words and short and simple sentences to express their intent clearly. In spite of continued admonitions of the courts to get rid of such language, insurance companies continue to issue such policies using insurance jargon and verbose and meaningless generalities, all of which result in ambiguities.

Champion International Corp. v. Continental Casualty Co., 400 F. Supp. 978, 981 (S.D.N.Y. 1975).

Again, I must assume that the generality and obscure nature of the language are intended to either confuse the consumer or hide something from him.

VI. DAMAGES

Section 130 of the Act, 15 U.S.C. § 1640(a)(1), sets the damages recoverable as twice the finance charge "in connection with the transaction, except that the liability under this paragraph shall not be less than $100 nor greater than $1,000." 15 U.S.C. § 1640(a)(2) also provides for the recovery of attorney's fees and costs for the successful plaintiff.

Plaintiffs contend that under the Act, joint borrowers are entitled to recover twice the amount of the damages

specified thereunder. This argument is based on the proposition that both debtors are required to receive the disclosures required by the Act and that each is therefore entitled to damages. This contention fails for two reasons.

First, the language of section 1640 itself is directed at the "transaction" involved, not the parties involved.

Secondly, the congressional intent to limit the recovery in a single credit transaction to $1,000.00 despite the number of borrowers is quite clear. The House Banking and Currency Committee Report, 1968 U.S. Code Cong. & Admin. News at 1976, states the purpose of the civil liability section as follows:

> While the primary enforcement of the bill would be accomplished under the administrative enforcement section . . . further provision is made for the institution of any civil action by an aggrieved debtor. Any creditor failing to disclose required information would be subject to civil suit with a penalty equal to twice the finance charge, with a minimum penalty of $100 and a maximum penalty of $1,000 *on any individual credit transaction*. . . . (Emphasis added).

The plaintiffs, therefore, are entitled to $1,000.00, costs and attorney's fees.

Dated this 6th day of April, 1976.

/s/ George E. Juba
United States Magistrate

After review of the file and record in this case, I approve the foregoing recommendation.

IT IS ORDERED that defendants' motions for summary judgment are denied.

IT IS FURTHER ORDERED that plaintiffs' motion for summary judgment is granted. Plaintiffs shall recover from the defendants the sum of $1,000.00. At a subsequent hearing attorney's fees shall be determined.

Dated this 6th day of April, 1976.

/s/ Robert C. Belloni
United States District Judge

ORDER

(Filed and Entered June 25, 1976)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DENNIS MILHOLLIN and MICHELLE MILHOLLIN,

Plaintiffs,

v.

FORD MOTOR CREDIT CO., a corporation, and DEE THOMASON FORD, a corporation,

Defendants.

CIVIL NO. 75-334

This is an action for money damages brought under the Truth in Lending section of the Consumer Credit Protection Act, 15 U.S.C. §1601, *et seq.*, for alleged violations of the Truth in Lending Act, and Federal Reserve Board Regulation Z (Reg. Z), 12 C.F.R. §226, *et seq.* Jurisdiction is conferred by 15 U.S.C. §1640(e).

The undisputed facts of this case are set out in the attached Recommendation and Order dated April 6, 1976. On that date, I reviewed the record, approved Magistrate Juba's recommendation, denied defendants' Motions for Summary Judgment, granted plaintiffs' Motion for Summary Judgment and ordered that plaintiffs recover judgment against the defendants in the sum of $1,000.

The defendants asked for and received a rehearing. I have studied their additional memoranda and have heard oral argument on the rehearing. Nothing contained in either, however, convinces me that any change in the original opinion should be made.

A recent case out of the Western District of Pennsylvania deserves some comment, however. *Virginia Jones Main v. Faller Ford, Inc. et al.*, Civil No. 74-337 (W.D.Penn. 1976). In that case, the judge believed that the contract adequately identified FMCC as a creditor. I have not seen the contract in the *Main* case. Its wording seems to be identical to the one in the case at hand. The contract in question has, as its only reference on the face of the contract to FMCC as a creditor, one sentence in small type above the place for the *seller's* signature. Dee Thomason Ford, on the other hand, is identified at the top of the face of the contract in rather large writing. FMCC has not been identified clearly within the meaning of Reg. Z.

Defendants ask this court to make this opinion effective only prospectively from the date of this opinion. They have presented no authority, however, which would give this court the power to reach such a result. That request is denied.

IT IS ORDERED that the defendants' motions to modify and/or vacate are denied.

Dated this 25 day of June, 1976.

/s/ Robert C. Belloni
United States District Court

ORDER

(Filed and Entered June 25, 1976)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DENNIS MILHOLLIN and MICHELLE MILHOLLIN,

Plaintiffs,

vs.

FORD MOTOR CREDIT CO., a corporation, and DEE THOMASON FORD, a corporation,

Defendants.

CIVIL NO. 75-334

Plaintiffs' attorneys fees are set at $750.00.

Dated this 25 day of June, 1976.

/s/ Robert C. Belloni
United States District Judge

SUMMARY JUDGMENT

(Filed and Entered June 25, 1976)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DENNIS MILHOLLIN and MICHELLE MILHOLLIN,

Plaintiffs,

v.

FORD MOTOR CREDIT CO., and DEE THOMASON FORD,

Defendants.

Civil No. 75-334

Based on the record,

IT IS ORDERED AND ADJUDGED that plaintiffs recover from the defendants the sum of $1,000.00 general damages and the sum of $750.00 attorneys fees.

Dated: June 25, 1976.

/s/ Robert M. Christ
Clerk of Court

OPINION

United States Court of Appeals,
Ninth Circuit
(Decided December 28, 1978; Reported
at 588 F.2d 753)

Dennis MILHOLLIN and Michelle Milhollin,
Plaintiffs-Appellees,

v.

FORD MOTOR CREDIT CO., a corporation, and
Dee Thomason Ford, a corporation,
Defendants-Appellants.

Dennis MILHOLLIN and Michelle Milhollin,
Plaintiffs-Cross Appellants,

v.

FORD MOTOR CREDIT CO., a corporation, and
Dee Thomason Ford, a corporation,
Defendants-Cross Appellees.

Donna M. EATON,
Plaintiff-Appellee,

v.

FORD MOTOR CREDIT CO., a corporation,
Defendant-Appellant,

Bud Meadows Mazda, Inc.,
Defendant.

Darrell MESSINGER,
Plaintiff-Appellee,

v.

FORD MOTOR CREDIT CO., a corporation, and
Marv Tonkin Ford Sales, Inc., a corporation,
Defendants-Appellants.

David P. ANDRESEN,
Plaintiff-Appellee,

v.

FORD MOTOR CREDIT CO., a corporation, and
Webster-Wolfard Ford, Inc., a corporation,
Defendants-Appellants,

and

The California Loan and Finance Association,
Amicus Curiae.

Nos. 76-2914, 76-3217, 77-3084, 77-3584 and 77-3569.

Herbert H. Anderson, Richard A. Slotte, Portland, Ore., for plaintiffs-appellees and defendants-appellants.

Appeal from the United States District Court for the District of Oregon.

Before WRIGHT and GOODWIN, Circuit Judges, and JAMESON,* District Judge.

EUGENE A. WRIGHT, Circuit Judge:

In these consolidated cases, Ford Motor Credit Corporation (Ford Credit) and several Ford dealers appeal from adverse judgments finding that they violated provisions of the Truth in Lending Act, 15 U.S.C. §§ 1601 *et seq.* (1976) (Act) and the regulations promulgated thereunder, 12 C.F.R. § 226.1 *et seq.* (1978) (Regulation Z).[1] Milhollin cross appeals from a limitation of Ford Credit's liability.

Although plaintiffs below (Consumers) allege a number of violations, we need to decide only two issues

*Senior District Judge, District of Montana.

[1]Sections of Regulation Z cited here have remained the same in all relevant respects since these actions arose.

common to the above cases and one issue raised by the Milhollins:

(1) Whether Ford Credit was clearly identified as a creditor on the face of the contract;

(2) Whether it is necessary to disclose an acceleration clause on the face of the contract; and

(3) Whether an inadequate disclosure made to a husband and wife as joint obligors results in a multiple recovery.

I.
FACTS[2]

Ford Credit, wholly owned by the Ford Motor Company, provides financing for Ford dealers by extending operating and inventory loans and by purchasing retail installment contracts for the sale of automobiles by dealers.

A Ford Credit booklet explains its program to dealers and gives guidelines for drafting contracts it is willing to purchase. It also provides forms of credit applications, contracts and rate charts for calculating finance charges. Use of the supplied forms is not mandatory, and Ford Credit purchases contracts on other agreement forms. Many dealers disregard the suggested rate charts and develop their own finance charges.

Dealers negotiate all terms of contracts directly with customers, including the interest rate. Contracts are typically assigned shortly after sales are consummated. Although Ford Credit normally is unaware of any specific sale until the contract is proffered for assignment,

[2]These are the facts common to all above cases. Facts unique to a single case are presented later in the text, as necessary.

dealers may get prior approval for customers with marginal credit ratings.

Ford Credit is not obligated to purchase any contracts from dealers, but usually rejects only a small percentage of those offered. It pays dealers cash for the contracts less its discount.

Each delaer here has assigned the great majority of its contracts to Ford Credit.[3] Shortly after each sale Ford Credit purchased the contract, notified the buyer, and provided him a payment book. Consumers made subsequent payments to Ford Credit.

II.
DISCLOSURE OF FORD CREDIT AS A CREDITOR

In each of these cases, the district court found that Ford Credit was not clearly identified as a creditor on the face of the contract, and that this nondisclosure violated the Act and Regulation Z. To uphold the district court, we must conclude that (a) the identity of each creditor is a required disclosure under the Act or Regulation Z; (b) Ford Credit is a creditor in these transactions within the meaning of the Act; and (c) Ford Credit's status as a creditor was not adequately disclosed on the face of the contract.

Consumers maintain that Regulation Z requires the disclosure of each creditor to a transaction on the

[3]In *Messinger,* of 600 to 700 contracts assigned six months prior to and six months after the transaction with the plaintiff, the dealer assigned all but 100 to Ford Credit. The dealer in *Andresen* assigned 90% of its contracts to Ford Credit.

face of the contract.[4] A number of courts have agreed.[5] Consumers also interpret a Federal Reserve Board Official Staff Interpretation of Regulation Z to require disclosure fo each creditor.[6] Ford Credit reads the

[4]Regulation Z provides:

> "*General rule.* Any creditor when extending credit other than open end credit shall, in accordance with § 226.6 and to the extent applicable, make the disclosures required by this section with respect to any transaction consummated on or after July 1, 1969. . . [S]uch disclosures shall be made before the transaction is consummated. At the time disclosures are made, *the creditor shall furnish the customer with a duplicate of the instrument or a statement by which the required disclosures are made and on which the creditor is identified.*"

12 C.F.R. § 226.8(a) (1978) (emphasis added).

> "*Multiple creditors or lessors; joint disclosure.* If there is more than one creditor or lessor in a transaction, *each creditor or lessor shall be clearly identified* and shall be responsible for making only those disclosures required by this Part which are within his knowledge and the purview of his relationship with the customer or lessee. If two or more creditors or lessors make a joint disclosure, *each creditor or lessor shall be clearly identified.*"

Id. at § 226.6(d) (emphasis added).

[5]*E. g., Lauletta v. Valley Buick, Inc.*, 421 F.Supp. 1036, 1039 (W.D.Pa. 1976); *Pedro v. Pacific Plan of California*, 393 F.Supp. 315, 319-20 (N.D.Cal. 1975).

Although this court has not addressed this precise issue, it intimated that the identification of each creditor is required by invalidating a disclosure statement that did not identify one of two joint creditors in its description of that element of the finance charge going to that creditor. *Ljepava v. M. L. S. C. Properties, Inc.*, 511 F.2d 935, 942 (9th Cir. 1975) (citing 12 C.F.R. §§ 226.6(d), 226.8(d)(3) (1974)).

[6]In 1976 the Federal Reserve Board was asked whether a disclosure statement in which the finance charge, annual percentage rate, and name of the creditor were printed in the same size type satisfied the requirements of 12 C.F.R. § 226.6(a) (1978), which states that the terms "finance charge" and "annual percentage rate" "shall be printed more conspicuously than other terminology required by this part."

The Board's response, issued pursuant to the authority granted by 12 C.F.R. § 226.1(d) (1978), stated: "Although *the identification of a creditor is a required disclosure under § 226.8 (a)*, this disclosure does not constitute required 'terminology.'" Official Staff Interpretation of Regulation Z, 41 Fed.Reg. 41908 (1976) (Emphasis added).

We have held that "[g]reat deference is especially due the Federal Reserve Board's construction of its own Regulation Z because of the important interpretative and enforcement powers granted this agency by Congress under the Truth in Lending Act." *Bone v. Hibernia Bank*, 493 F.2d 135, 139 (9th Cir. 1974). *See also Anthony v. Community Loan & Investment Corp.*, 559 F.2d 1363, 1367 (5th Cir. 1977); *Johnson v. McCrackin-Sturman Ford, Inc.*, 527 F.2d 257, 267 n.23 (3d Cir. 1975).

Official Interpretation narrowly to reach an opposite result.[7]

Consumers allege that Ford Credit is a creditor within the meaning of the Act[8] because it extended credit directly to them, using the dealers merely as a means to arrange for the credit. Ford Credit argues that it was a subsequent assignee of the retail installment contract, extending only commercial credit to the dealers. It cites the apparently different treatment accorded an "original creditor" and a "subsequent assignee" in various sections of the Act as evidence that Congress did not intend subsequent assignees to be subject to the same disclosure requirements as creditors.[9] Con-

[7]Ford Credit relies on the strained reading given 12 C.F.R. § 226.8(a) (1978) and the Official Staff Interpretation in *Grey v. European Health Spas, Inc.*, 428 F.Supp. 841, 843 (D.Conn. 1977).

[8]Regulation Z defines "creditor" as

> a person who in the ordinary course of business regularly extends or arranges for the extension of consumer credit, or offers to extend or arrange for the extension of such credit, which is payable by agreement in more than four instalments, or for which the payment of a finance charge is or may be required, whether in connection with loans, sales of property or services, or otherwise.

12 C.F.R. § 226.2(s) (1978).

[9]See, *e. g.*, 15 U.S.C. §§ 1614, 1640(d), 1641 (1976).

sumers respond by citing cases that, in certain circumstances, equate subsequent assignees with creditors for disclosure purposes.[10]

For our purposes it is unnecessary to decide whether the identification of each creditor is a required disclosure or if Ford Credit is a creditor of Consumers. Assuming an affirmative answer to these questions, we conclude that the status of Ford Credit, even if it is as a creditor, was adequately disclosed.

On the face of each contract, opposite the signature of Consumers, appears the following disclosure:

> The foregoing contract hereby is accepted by the Seller and assigned to Ford Motor Credit Company in accordance with the terms of the assignment set forth on the reverse side hereof.
>
> Seller ....
>
> By .... Title ....

Consumers argue that the terms of 12 C.F.R. § 226.6(d) (1978), which provide that "each creditor . . . shall be clearly identified," are not met by disclosing that Ford Credit would be an assignee of the contract. They apparently argue that, because the precise

[10] *Meyers v. Clearview Dodge Sales, Inc.*, 539 F.2d 511, 514-16 (5th Cir. 1976); *Mirabal v. General Motors Acceptance Corp.*, 537 F.2d 871, 874 n.1 (7th Cir. 1976); *Joseph v. Norman's Health Club, Inc.*, 532 F.2d 86, 91-92 (8th Cir. 1976); *Bird v. Goddards Discount Furniture*, 443 F.Supp. 422, 423-24 (S.D.Ill. 1978); *Poirrier v. Charlie's Chevrolet, Inc.*, 442 F.Supp. 894, 895-96 (E.D.Mo. 1978); *Cenance v. Bohn Ford, Inc.*, 430 F.Supp. 1064, 1068-69 (E.D.La. 1977); *Lauletta v. Valley Buick, Inc.*, 421 F.Supp. 1036, 1039 (W.D.Pa. 1976); *Starks v. Orleans Motors, Inc.*, 372 F.Supp. 928, 930 (E.D.La. 1974), *aff'd*, 500 F.2d 1182 (5th Cir. 1974); *Kriger v. European Health Spas, Inc., of Milwaukee, Wisconsin*, 363 F.Supp. 334, 336 (E.D.Wis. 1973); *Garza v. Chicago Health Clubs, Inc.*, 347 F.Supp. 955, 963-64 (N.D.Ill. 1972).

word "creditor" was not used in describing Ford Credit's prospective involvement in the transaction, the Act was violated. We disagree. Nowhere does Regulation Z require use of the word "creditor." Here, the exact role that Ford Credit ultimately played in each transaction was clearly disclosed. Requiring Ford Credit to use the word "creditor" would not have given Consumers additional information nor better served the purposes of the Act.

In *Main v. Faller Ford, Inc.*, Civil Action No. 74-337 (W.D.Pa. Apr. 22, 1976), the court held that an identical statement satisfied the creditor disclosure requirements of Regulation Z:

> Whether Ford Credit may be described as the term is used in [12 C.F.R.] § 226.6(d) need not be decided in this factual context because to require such a disclosure by Ford Credit on a separate piece of paper would not be a meaningful disclosure nor would it further the goals of the Truth-In-Lending Act. Ford Credit was accurately described in the contract as the assignee and it is undisputed that plaintiff personally understood that Ford Credit would actually extend her credit and consequently be the recipient of her monthly installment payments. . . . To require Ford Credit to also disclose to plaintiff that it was also a "creditor" within the Act would be a meaningless and needless exercise providing plaintiff with duplicative information, and such duplication cannot be justified by the Act's purpose nor by the practical considerations of these circumstances.

Accord, Sharp v. Ford Motor Credit Co., 452 F.Supp. 465 (S.D.Ill. 1978) (appeal pending); *Antonio v. Can-*

al Motors, Inc., Civil Action No. 74-3163 (E.D.La. Nov. 18, 1977) (appeal pending); *Augusta v. Marshall Motor Co.,* 453 F.Supp. 912 (N.D.Ohio 1977) (appeal pending).

We agree with the reasoning in *Main* and hold that the district court erred in finding that Ford Credit was not adequately identified as a creditor on the face of the contract.[11]

III.
DISCLOSURE OF AN ACCELERATION CLAUSE

The reverse side of each contract contained an acceleration clause that did not explain the effect of acceleration on unearned interest. Ford Credit maintains that its uniform practice, although not explicitly disclosed, is to rebate unearned interest to the customer upon acceleration in the same manner as that following a voluntary prepayment.

This court faced a similar situation in *St. Germaine v. Bank of Hawaii,* 573 F.2d 572 (9th Cir. 1977). We held there that

> [t]he creditor must disclose whether a rebate of unearned interest will be made upon acceleration and also disclose the method by which the amount of unearned interest will be computed if the debt is accelerated.

Id. at 577. Failure to make these disclosures is a violation of the Act.

In *Milhollin,* the district court concluded on different grounds than those stated in *St. Germaine* that failure

[11]Since we conclude that Ford Credit's disclosure of its status was adequate, we need not consider the sufficiency of additional disclosures attached to the contract in *Andresen.*

to disclose the acceleration clause on the face of the contract was a violation of the Act. The court held, however, that it would result in liability only after the decision in *Woods v. Beneficial Finance Co. of Eugene,* 395 F.Supp. 9 (D.Or. 1975), the first Oregon case recognizing this nondisclosure as a violation. In so holding, the district court exceeded its authority because "[t]he application of doctrines limiting the retroactivity of judicial decisions is restricted to appellate courts." *Kessler v. Associates Financial Service Co.,* 573 F.2d 577, 579 (9th Cir. 1977).

We hold on the basis of *St. Germaine* that Ford Credit is liable to the Milhollins for failure to disclose the acceleration clause and its effect on unearned interest on the face of the contract.

IV.
RECOVERY FOR INADEQUATE DISCLOSURE BY JOINT OBLIGORS

At the time of the transaction in *Milhollin,* plaintiffs were husband and wife. Both signed the retail installment contract, making them jointly and severally liable for the full debt under Oregon law. They allege that the district court erred in limiting them as joint obligors to one recovery for violations under the Act.

The Act provides:

> [A]ny creditor who fails to comply with any requirement imposed under this part . . . with respect to *any person* is liable to *such person* in an amount equal to the sum of—
>
> . . .
>
> (2)(A)(i) in the case of an individual action twice the amount of any finance charge *in connec-*

tion with the transaction . . ., except that *the liability under this subparagraph shall not be less than $100 nor greater than $1,000*. . . .

15 U.S.C. § 1640(a)(1976). The first quoted words emphasized, "any person" and "such person," suggest that each joint obligor is entitled to a separate recovery. The emphasized words in the second paragraph, however, suggest that the liability for any single transaction is limited to $1,000.

The circuits have split on this issue. The Fifth and Seventh Circuits have concluded that a husband and wife as joint obligors are entitled to separate recoveries. *Davis v. United Companies Mortgage & Inv. of Gretna, Inc.*, 551 F.2d 971 (5th Cir. 1977); *Mirabal v. General Motors Acceptance Corp.*, 537 F.2d 871, 881-83 (7th Cir. 1976); *Allen v. Beneficial Finance Co. of Gary*, 531 F.2d 797, 805-06 (7th Cir.), *cert. denied*, 429 U.S. 885, 97 S.Ct. 237, 50 L.Ed.2d 166 (1976). The Fourth Circuit reached the opposite result in *Powers v. Sims and Levin*, 542 F.2d 1216, 1219-20 (4th Cir. 1976), in which the court limited the recovery of husband and wife as joint obligors to one penalty.

We believe that the Fourth Circuit's approach more closely reflects the intent of Congress. The applicable legislative history states:

> Any creditor failing to disclose required information would be subject to a civil suit with a penalty equal to twice the finance charge, with a minimum penalty of $100 and *a maximum penalty not to exceed $1,000 on any individual credit transaction.*

H.R.Rep.No. 1040, 90th Cong., 2d Sess., [1968] U.S. Code Cong. & Admin. News, pp. 1962, 1976 (emphasis added). The Milhollins, although joint obligors, entered into one credit transaction with the dealer and Ford Credit. They are entitled to one recovery.

IV.
CONCLUSION

Because the district court in *Andresen* and *Messinger* concluded Ford Credit violated the Act only on the basis of an inadequate disclosure of its creditor status, a conclusion we reject, we remand those cases for a consideration of other alleged violations of the Act not treated by the court.

Although the district court in *Milhollin* found liability on the ground used in *Andresen* and *Messinger*, it also concluded Ford Credit violated the Act by failing to disclose an acceleration clause on the face of the contract. In light of *St. Germaine*, we disagree with the rationale used by the court, but hold on other grounds that Ford Credit violated the Act by failing to disclose an acceleration clause and its effect on unearned interest. We also disagree with the court's prospective application of *Woods*, and hold that Ford Credit is liable to the Milhollins for its nondisclosure. As joint obligors, they are entitled to only one recovery.

We affirm the holding of the district court in *Eaton*, again under a different rationale,[12] on the basis of

[12]Noting that it would be "a waste of judicial time and effort" to set forth the reasons for its decisions in light of the thorough discussion in *Milhollin*, then on appeal to this court, the district court in *Eaton* merely adopted the rationale of *Milhollin*. We agree with the conclusion in *Milhollin* that failure to disclose an acceleration clause on the face of a contract is a violation of the Act, but do so on different grounds.

Ford Credit's failure to disclose an acceleration clause and its effect on unearned interest on the face of the contract.[18]

AFFIRMED IN PART AND REVERSED IN PART.

[18]Since multiple violations of the Act in any single credit sale transaction result in only one recovery, 15 U.S.C. § 1640(g) (1976), it is unnecessary to consider any other alleged violations in *Milhollin* and *Eaton*.

FORD MOTOR CREDIT COMPANY
v.
DONNA M. EATON

RELEVANT DOCKET ENTRIES

June 24, 1976	Complaint filed
August 18, 1976	Answer of Ford Motor Credit Company filed
September 15, 1976	Answer of Bud Meadows Ford Inc. filed
October 12, 1976	Stipulation filed permitting Plaintiff to amend complaint to substitute Bud Meadows Mazda, Inc. for Bud Meadows Ford, Inc.
October 12, 1976	Amended Complaint filed
October 12, 1976	Notice of Voluntary Dismissal as to Bud Meadows Ford, Inc. filed
October 27, 1976	Answer of Ford Motor Credit Company to Plaintiff's Amended Complaint filed
May 24, 1977	Record of court trial; Order taking case under advisement
June 16, 1977	Opinion filed
July 5, 1977	Testimony of William F. Bellisario (admitted into record on May 24, 1977) filed
August 12, 1977	Findings of Fact and Conclusions of Law filed
August 12, 1977	Judgment awarding Plaintiff $1,300.00 filed and entered
September 7, 1977	Notice of Appeal filed
March 29, 1978	Order consolidating appeals filed
December 28, 1978	Opinion filed and Judgment filed and entered
June 26, 1979	Supreme Court Order of June 18, 1979 granting certiorari filed

AMENDED COMPLAINT TO ENFORCE CIVIL LIABILITY UNDER TRUTH IN LENDING ACT

(Filed October 12, 1976)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DONNA M. EATON,

Plaintiff,

vs

FORD MOTOR CREDIT COMPANY, a corporation,

Defendant.

CIVIL NO. 76-575

COMPLAINT

COUNT I

1. This is an action for money damages. This complaint is filed and these proceedings are instituted under the Truth In Lending Act, 15 U.S.C.A. §1601 et seq (hereinafter called "Act") to recover statutory damages, reasonable attorney's fees, and costs of suit by reason of the defendant's violation of the Act and Federal Reserve Regulation Z, 12 C.F.R. §226.1 et seq (hereinafter called Regulation Z), adopted by the Board of Governors of the Federal Reserve System pursuant thereto. The jurisdiction of this court is invoked pursuant to §130(e) of the Act, 15 U.S.C.A. §1640(e), and 28 U.S.C.A. §1337.

2. The plaintiff is a natural person residing in Portland, Oregon.

3. The defendant, Ford Motor Company, is a foreign corporation engaged in the business of financing automobile purchaes at 4309 N.E. Tillamook, PO Box 13070, Portland, Oregon. At all times relevant hereto, defendant Ford Motor Credit Company, in the ordinary course of business, regularly extended, offered to extend, arranged and offered to arrange the extension of con-

sumer credit, for which a finance charge is or may be imposed, or which is payable in more than four installments.

4. Bud Meadows Mazda is an Oregon corporation engaged in the business of selling automobiles at 1818 S.E. 82nd Avenue, Portland, Oregon. At all times relevant hereto, Bud Meadows Mazda, Inc., in the ordinary course of its business, regularly extended, offered to extend, arranged and offered to arrange the extension of consumer credit, for which a finance charge is or may be imposed, or which is payable in more than four installments.

5. On or about June 28, 1975, plaintiff entered into a consumer credit transaction with Bud Meadows Mazda, Inc. and defendant herein, which transaction consisted of the purchase from defendant of a 1973 Chevrolet Camaro automobile, for a cash price of $3,515, a finance charge of $722.10, a total of payments of $3,731.04, and a deferred payment price of $4,448.04. This purchase was financed in the regular course of business by defendant Ford Motor Credit Company, and the contract evidencing this purchase was assigned to defendant Ford Motor Credit Company in the regular course of business.

6. A true and accurate copy of the contract evidencing this purchase is attached hereto, marked "Plaintiff's Exhibit A", and by this reference is incorporated herein.

7. In the course of this transaction, defendant violated the provisions of §121 of the Act, 15 U.S.C.A. §1631, and §226.8 and §226.6 of Regulation Z, in the following respects:

(a) By failing to clearly identify on the front of the contract Ford Motor Credit Company as

a creditor in the transaction, as required by §226.6(d), §226.6(a), and §226.8(a) of Regulation Z.

(b) By failing to disclose on the front of the contract that the defendant had the option of declaring the entire unpaid balance of the contract immediately due and payable in the event of a default or late payment by the plaintiff, as required by §128(a)(9) of the Act, 15 U.S.C.A. §1638(a)(9), and §226.8(a), §226.6(a), and §226.8(b)(4) of Regulation Z.

(c) By failing to describe or identify the type of security interest retained or acquired by defendant Ford Motor Credit Company, as required by §128(a)(10) of the Act, 15 U.S.C.A. §1638(a)(10) and §226.8(b)(5) of Regulation Z.

(d) By failing to describe or identify the type of security interest retained or acquired by defendant Ford Motor Credit Company in the automobile purchased by plaintiff, as required by §128(a)(10) of the Act, 15 U.S.C.A. §1638(a)(10), and §226.8(b)(5) of Regulation Z.

(e) By failing to describe or identify the type of security interest retained or acquired by defendants in the amounts due or to become due under the contract, as required by §128(a)(10) of the Act, 15 U.S.C.A. §1638(a)(10), and §§ 226.8(b)(5) and 226.6(a) of Regulation Z.

(f) By failing to clearly disclose on the face of the contract that in the event of default the defendant had the right to collect attorney's fees in the amount of fifteen percent, as required by §§226.8(b)(4), and 226.8(a), and §226.6(a) of Regulation Z.

(g) By failing to disclose on the face of the contract a description of each amount included in the finance charge, as required by §226.8(c)(8)(i) of Regulation Z.

(h) By failing to clearly identify or disclose on the front of the contract Bud Meadows Mazda, Inc. as a creditor in the transaction, as required by §226.6(d), §226.6(a) and §226.8(a) of Regulation Z.

(i) By failure to furnish the plaintiff with a duplicate of the original contract, in that the contract furnished to the plaintiff does not reflect the name and address of Bud Meadows Mazda, Inc. as a creditor, as required by §226.8(a) of Regulation Z.

8. As a result of the aforesaid violations of the Act, the defendant is liable to plaintiff in the sum of $1,000, plus costs and reasonable attorney's fees, as provided by §130(a) of the Act, 15 U.S.C.A. §1640(a).

WHEREFORE, plaintiff prays as follows:

1. Pursuant to §130(a) of the Truth In Lending Act, judgment be entered in plaintiff's favor and against the defendant in the sum of $1,000;

2. For reasonable attorney's fees as provided for in §130(a) of the Truth In Lending Act;

3. For costs;

4. For such other relief as may be just and proper.

/s/ Richard A. Slottee
RICHARD A. SLOTTEE
Of Attorneys for Plaintiff

("Plaintiff's Exhibit A" Not Attached to Amended Complaint Contained in Record)

(Certificate of Mailing Omitted in Printing)

NOTICE OF VOLUNTARY DISMISSAL

(Filed October 12, 1976)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

(Title Omitted in Printing)

Plaintiff herein voluntarily dismisses the within action as to defendant Bud Meadows Ford, Inc., only.

IT IS SO STIPULATED:

/s/ Richard A. Slottee
RICHARD A. SLOTTEE
Of Attorneys for Plaintiff

Date: 10/6/76

/s/ John Berman
JOHN BERMAN
Attorney for Defendant
Ford Motor Credit Company

Date: 10/6/76

/s/ Stephen S. Smith
STEPHEN S. SMITH
Attorney for Defendant
Bud Meadows Ford, Inc.

Date: 10/6/76

TRUTH-IN-LENDING

ANSWER OF FORD MOTOR CREDIT COMPANY TO PLAINTIFF'S AMENDED COMPLAINT

(Filed October 27, 1976)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

(Title Omitted in Printing)

For answer to plaintiff's Amended Complaint, defendant Ford Motor Credit Company admits and denies as follows:

1. Admits that plaintiff's Amended Complaint purports to be an action for money damages filed and instituted under the Truth-in-Lending Act, 15 USC § 1601 et seq. to recover statutory damages, reasonable attorney's fees, and costs of suit by reason of purported violations of said Act and Federal Reserve Regulation Z, 12 CFR § 226.1 et seq. adopted by the Board of Governors of the Federal Reserve Board pursuant thereto; that the jurisdiction of the Court purports to be invoked pursuant to § 130(e) of the Act, 15 USC § 1340(e) and 28 USC § 1337, and except as so admitted, denies plaintiff's paragraph 1.

2. Admits paragraph 2.

3. Admits that defendant Ford Motor Credit Company is a foreign corporation engaged in business at 4309 N. E. Tillamook, P. O. Box 13070, Portland, Oregon, and except as so admitted, denies the remainder of paragraph 3.

4. Admits that defendant Bud Meadows Mazda is an Oregon corporation engaged in the business of selling automobiles at 1818 S. E. 82nd Avenue, Port-

land, Oregon, and except as so admitted, denies the remainder of paragraph 4.

5. Admits that the contract evidencing plaintiff's purchase of a 1973 Chevrolet Camaro automobile for a cash price of $3,515.00, finance charge of $722.10, a total payment of $3,731.04 and a deferred payment price of $4,448.04 was assigned to defendant Ford Motor Credit Company at sometime after the sale of said vehicle by Bud Meadows Mazda to plaintiff, and except as so admitted, denies the remainder of paragraph 5.

6. Admits that Exhibit A, attached to plaintiff's Complaint, is a substantial copy of plaintiff's copy of her contract with Bud Meadows Mazda evidencing her purchase, and except as so admitted, denies the remainder of paragraph 6.

7. Denies paragraph 7.

8. Denies paragraph 8.

FIRST DEFENSE

9. Plaintiff's Amended Complaint fails to state facts sufficient to constitute a claim upon which relief can be granted.

SECOND DEFENSE

10. The original contract delivered and assigned to Ford Credit contained the name and address of the seller and buyer when so delivered and assigned. A true and correct copy is attached hereto as Exhibit A. Plaintiff acknowledged in writing on said contract that she had received a true and completely filled in copy of the contract. Ford Credit did not know to the contrary when it acquired the obligation.

WHEREFORE, defendant Ford Motor Credit Company prays that plaintiff's Complaint be dismissed and it have and recover judgment for its costs and disbursements incurred herein.

/s/ Dezendorf, Spears, Lubersky & Campbell
Herbert H. Anderson
John M. Berman

DEZENDORF, SPEARS,
LUBERSKY & CAMPBELL
Herbert H. Anderson
John B. Berman
Attorneys for Defendant
Ford Motor Credit Company

(Affidavit of Mailing Omitted in Printing)

64-65

OREGON AUTOMOBILE RETAIL INSTALMENT CONTRACT

DATE 6-28-75

Buyer (and Co-Buyer) - Name and Address (Include - County and Zip Code)	ACCOUNT NO. Seller - Name and Address
Donna M. Eaton 239 S.E. Ankeny Circle Portland, oregon 97233	Bud Meadows Mazda 1818 SE. 82 Portland, Oregon 97213

Buyer (which means the undersigned Buyers and Co-Buyers, jointly and severally) having been quoted both a deferred payment price and a lesser cash price hereby purchases from Seller on a time price basis, upon the terms and conditions set forth on the face and reverse sides hereof, the following property (hereinafter called the "Property") delivery and acceptance of which in good order hereby are acknowledged by Buyer.

New or Used	Year and Make	Series	Body Style	No. Cyl.	If Truck Ton Capacity	Manufacturer's Serial Number	Use For Which Purchased
USED	1973 CHEVROLET	CAMERO				#1S87H3N147248	☐ Personal ☑ Business ☐ Agriculture

INCLUDING: ☐ Radio ☐ Air Conditioner ☐ Automatic Transmission ☐ Power Steering ☐ Power Brakes ☐ Power Seats ☐ Power Windows ☐

DESCRIPTION OF TRADE IN

(Year and Make) $ (Gross Allowance)

(Serial Number) $ (Amount Owing)

OPTIONAL INSURANCE

Buyer authorizes Seller to obtain the following insurance coverages:

(a) Physical Damage Insurance: Coverages checked below for a term of ____ months (or for such shorter term as the insurer to whom Seller shall apply therefor will provide for the amount included herein) from the date hereof covering accidental physical damage to the Property based on actual cash value at the time of loss not to exceed policy limits payable to Buyer or Seller as interests may appear:

☐ Comprehensive ☐ Fire-Theft & Combined Additional Coverage

☐ $____ Deductible Collision ☐ Towing & Labor Costs ($25.00 Limit) $____ (a)

(b) Credit Life Insurance on the life of Donna Eaton (Insured Person) for the term of this contract.

☐ Provided under Ford Life Insurance Company's Group Policy No. 2200 in accordance with the "Credit Life Insurance Eligibility" section below.

Insured Buyer's Age ____

☑ Provided by AIA in accordance with the separate Application, Notice, Certificate or Policy delivered to Buyer on this date. $67.16 (b)

(c) Credit Accident and Health or Disability Insurance on Donna Eaton (Insured Person) for the term of this Contract.

Provided by AIA in accordance with the separate Application, Notice, Certificate or Policy delivered to Buyer this date. $141.75 (c)

(d) Other Optional Insurance ____ (d)

Provided by ____

for a term of ____ months.

Total Cost of Optional Insurance $208.91

NOTICE TO BUYER: (1) You are not required to obtain the Credit Life and/or Credit Accident and Health or Disability Insurance for which a charge is indicated above and such is not a factor in the Seller's approval of this credit. (2) You have the right to choose the person through whom the Physical Damage Insurance required under this contract is to be obtained. ACKNOWLEDGING the foregoing, BUYER requests and authorizes SELLER to obtain each insurance coverage for which an amount is included above.

Buyer: Donna M. Eaton Date 6/28/75

(Cost of insurance to be included only if signed by each insured Buyer and dated)

LIABILITY INSURANCE COVERAGE FOR BODILY INJURY AND PROPERTY DAMAGE CAUSED TO OTHERS IS NOT INCLUDED.

CREDIT LIFE INSURANCE ELIGIBILITY

Credit life insurance under Ford Life Insurance Company's Group Policy No. 2200 is available only on the life of one natural person who is obligated to make payments under this retail instalment instrument and who is under the age of 66 on the date hereof. Benefits will be limited to a refund of premiums if there is no person eligible for such insurance, or if death results from suicide within two years from the date hereof. For details see Notice of Proposed Group Credit Life Insurance on reverse side of Buyer's Copy.

The foregoing contract hereby is accepted by the Seller and assigned to Ford Motor Credit Company in accordance with the terms of the Assignment set forth on the reverse side hereof.

Seller: Bud Meadows Mazda

By [signature] Title Business Manager

DETAILS OF TRANSACTION

(1) Cash Price $3515.00 (1)

Cash Down Payment $617.00

Pickup payment 100.00

Trade In (See Opposite) $—

(2) Total Down Payment $717.00 (2)

(3) Unpaid Balance of Cash Price (Difference between Items 1 & 2) $2798.00 (3)

(4) Other Charges

Optional Insurance (See Opposite) $208.91

Official Fees $—

Taxes (Not included in Cash Price) $—

License, Title & Registration Fees $2.00

Total Other Charges $210.91 (4)

(5) Unpaid Balance - Amount Financed $3008.91 (5)

(6) FINANCE CHARGE $722.13 (6)

(7) ANNUAL PERCENTAGE RATE 14.55 % (7)

(8) Total of Payments (Sum of Items 5 & 6) $3731.04 (8)

(9) Deferred Payment Price (Sum of Items 1, 4 & 6) $4448.04 (9)

(10) Payment Schedule: Buyer hereby agrees to pay to Seller the Total of Payments (Item 8 above) in 36 monthly instalments of $103.64 each and one final instalment of $—— on the like day of each month commencing 8-9-1975; or, if no date is specified, one month after the date of this contract, plus a pickup payment of $100.00 on which no finance charge is assessed, due on 7-9-1975.

(11) Balloon Payment(s) $100.00 on 7/9/75 —— on ——

(Insert amount of each payment that is more than twice the amount of any otherwise regularly scheduled equal payment)

A balloon payment may be refinanced only upon such terms and conditions as the then parties to this contract may agree as of its due date.

(12) Delinquency Charges: Buyer hereby agrees to pay a delinquency charge on each instalment in default for more than 10 days in the amount of 5% thereof or $5.00, whichever is less, plus such expenses incurred by Seller in effecting collection hereunder as may be allowed by law.

(13) Security Interest: Seller shall have a security interest under the Uniform Commercial Code in the Property (described above) and in the proceeds thereof to secure the payment in cash of the Total of Payments and all other amounts due or to become due hereunder.

(14) Prepayment Rebate: Buyer may prepay his obligations under this contract in full at any time prior to maturity of the final instalment hereunder, and, if he does so, shall receive a rebate of the unearned portion of the Finance Charge computed under the sum of the digits method after first deducting an acquisition fee of $15.00. No rebate will be made if the amount is less than $1.00.

(15) Additional Terms and Conditions: The additional terms and conditions set forth on the reverse side hereof are a part of this contract and are incorporated herein by reference.

NOTICE TO THE BUYER

Do not sign this contract before you read it or if it contains any blank space, except that if delivery of the vehicle is to be made to you after this contract is signed, the serial number or other identifying information and the due date of the first instalment may be filled in at the time of delivery.
You are entitled to a copy of this contract.
You have the right to pay off in advance the full amount due and to obtain a partial refund of the finance charge.

Buyer acknowledges receipt of a true and completely filled in copy of this

RETAIL INSTALMENT CONTRACT

Buyer: Donna M. Eaton

Co-Buyer: [signature]

FOR SELLER'S USE ONLY

INSURANCE COVERAGE (TO BE COMPLETED, IF PHYSICAL DAMAGE INSURANCE IS NOT INCLUDED IN THE ABOVE CONTRACT.)

NAME OF INSURANCE AGENT ____ TELEPHONE NO. ____

ADDRESS OF INSURANCE AGENT ____

NAME OF INSURANCE COMPANY ____ POLICY NO. ____

CHECK COVERAGES

☐ Comprehensive ☐ $____ Deductible Collision ☐ Fire-Theft & Combined Additional Coverage

SALESMAN ____ (Please Print or Type Name)

CONSUMER PAPER

FMCC 11236 JUL 73 | FOR DEALER'S USE ONLY | KEY-I | KEY-II | CHD | HP |

ORIGINAL

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ADDITIONAL TERMS AND CONDITIONS

16. ASSIGNMENT
The original Seller may assign this contract and his assignee shall acquire all of his interest in this contract and the Property and shall be entitled to all the rights and privileges of Seller hereunder. After Buyer receives notice of any such assignment, Buyer shall make all payments hereunder directly to the holder hereof and the original Seller shall not be the agent of the holder for transmission of payments or otherwise. Buyer shall not transfer or otherwise dispose of any interest in this contract or the Property.

17. USE OF PROPERTY - WARRANTIES
Buyer shall keep the Property free from all encumbrances, and any amount that may be paid by Seller in release or discharge thereof shall be paid by Buyer to Seller forthwith upon demand with interest at the highest lawful contract rate. Buyer shall not use the Property illegally, improperly or for hire (unless stated herein) and shall not remove the Property from the county of his residence without the written permission of Seller. No representation, promise or warranty, express or implied, has been made with respect to the merchantability, suitability or fitness for purpose of the Property or otherwise unless the same is endorsed hereon in writing or is contained in a separate written instrument signed by the original Seller. Buyer will settle directly with the original Seller all claims concerning the Property or its use or operation.

18. RISK OF LOSS - INSURANCE
The Property shall be at Buyer's risk. Buyer shall obtain and maintain at his own expense for so long as any amount remains unpaid hereunder insurance protecting the interests of Buyer and Seller against loss, damage or destruction of or to the Property in such forms and amounts as Seller may require. The inclusion of a charge for insurance herein shall not relieve Buyer of such obligation but only authorizes Seller to attempt to obtain the requested coverages on Buyer's behalf through an authorized agent; provided, if Seller is unable to obtain the requested coverages for the term indicated for the amount included herein, Seller may (i) obtain such coverages for such term, if any, as the insurance carrier to whom Seller shall apply therefor will provide for such amount, or (ii) credit such amount to the final maturing instalments hereunder in inverse order of maturity or as otherwise required by law.

If Buyer fails to obtain or maintain such insurance, or fails to furnish satisfactory evidence thereof upon request, Seller may, but shall not be required to, and without prejudice to his rights hereunder if he does not, obtain such insurance protecting either the interests of Buyer and Seller or the interests of Seller only. In such event, Buyer agrees to reimburse Seller for the cost thereof forthwith upon demand together with interest thereon at the highest lawful contract rate.

Buyer hereby assigns to Seller any monies payable under such insurance, by whomever obtained, including returned or unearned premiums, and Seller hereby is authorized on behalf of both Buyer and Seller to receive or collect same, to endorse checks or drafts in payment thereof, to cancel such insurance or to release or settle any claim with respect thereto. The proceeds from such insurance, by whomever obtained, shall be applied toward replacement of the Property or payment of the indebtedness hereunder in the sole discretion of Seller.

19. DEFAULT
Time is of the essence of this contract. In the event Buyer defaults in any payment, or fails to obtain or maintain the insurance required hereunder, or fails to comply with any other provision hereof, or a proceeding in bankruptcy, receivership or insolvency shall be instituted by or against Buyer or his property, or Seller deems the Property in danger of misuse or confiscation, or Seller otherwise reasonably deems the indebtedness or the Property insecure, Seller shall have the right to declare all amounts due or to become due hereunder to be immediately due and payable and Seller shall have all the rights and remedies of a Secured Party under the Uniform Commercial Code, including the right to repossess the Property wherever the same may be found with free right of entry, and to recondition and sell the same at public or private sale. Upon request, Buyer shall deliver the Property to Seller at a place designated by Seller. Seller shall have the right to retain all payments made prior to repossession and Buyer shall remain liable for any deficiency to the extent permitted by law. Any personalty in or attached to the Property when repossessed may be held by Seller without liability and Buyer shall be deemed to have waived any claim thereto unless written demand by certified mail is made upon Seller within 24 hours after repossession. Buyer agrees to pay reasonable attorneys' fees (15% if permitted by law) and other expenses incurred by Seller in effecting collection, repossession or resale hereunder. Seller's remedies hereunder are in addition to any given by law and may be enforced successively or concurrently. Waiver by Seller of any default shall not be deemed a waiver of any other default.

20. GENERAL
No transfer, renewal, extension or assignment of this contract or any interest hereunder, and no loss, damage or destruction of or to the Property, shall release Buyer from his obligations hereunder. This contract constitutes the entire agreement between the parties and no modification hereof shall be valid in any event, and Buyer expressly waives the right to rely thereon, unless made in writing signed by Seller. Any provision of this contract prohibited by applicable law shall be ineffective to the extent of such prohibition without invalidating any other provision of this contract. This contract shall be governed by the laws of the state in which the original Seller is located as shown on the face of this contract.

GUARANTY

For Value Received, each of the undersigned guarantors, jointly and severally, guaranties the prompt and unconditional payment, performance and discharge of all Buyer's obligations under the within contract and covenants that in the event of default in any of said obligations thereunder, to pay upon demand the full amount remaining unpaid thereunder together with a reasonable attorney's fee (15% of the amount then due, or if prohibited, the amount permitted by law) if placed with an attorney for collection. The liability of undersigned shall not be affected by any extension, renewal or other change in the time of payment of the said contract, or any change in the manner, place or terms of payment thereof, or the release, settlement or compromise of or with any party liable for the payment thereof, or the release or non-perfection of any security thereunder. The holder of the within contract shall not be bound to exhaust its recourse against Buyer or any other person or any security the holder may at any time have before being entitled to payment from the undersigned hereunder. [illegible]

Guarantor ____ Address ____

Guarantor ____ Address ____

ASSIGNMENT

The Seller named on the face of this contract sells, assigns, and transfers to Ford Motor Credit Company (hereinafter called "Ford Credit") his, its or their entire right, title and interest in and to the within contract and the Property described therein [illegible]

☐ "WITHOUT RECOURSE" The assignment of said contract is and shall be without recourse against the Seller, except as otherwise provided by the terms of the Ford Motor Credit Company Retail Plan in effect at the time this assignment is accepted.

☒ "REPURCHASE" The Seller guarantees payment of the full amount remaining unpaid under said contract, and covenants if default be made in payment of any instalment thereunder to pay the full amount then unpaid to Ford Credit upon demand, except as otherwise provided by the terms of the Ford Motor Credit Company Retail Plan in effect at the time this assignment is accepted.

☐ "LIMITED REPURCHASE" [illegible]

☐ "PARTIAL GUARANTY" [illegible]

☐ "FULL GUARANTY" Notwithstanding the terms of the Ford Motor Credit Company Retail Plan, the Seller unconditionally guarantees payment of the full amount remaining unpaid under said contract and agrees to purchase said contract from Ford Credit, upon demand, for the full amount then unpaid whether said contract shall then be, or not be, in default.

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BEST COPY AVAILABLE

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TESTIMONY OF WILLIAM F. BELLISARIO

(Admitted into Record on May 24, 1977—Transcript at 19; Filed July 5, 1977)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

He is the branch manager of the Portland branch of Ford Motor Credit Company. He has been with Ford Credit for fifteen years, in virtually every position involved at the branch level.

Ford Credit supplies financing to various automobile dealers. It does so by making capital loans and inventory loans, and by purchasing contracts from such dealers, or any combination of the three.

With respect to the purchase of contracts from dealers, Ford Credit has procedures for purchasing contracts. It advises the dealers as to the standards for acceptable contracts, but it reserves the right to refuse any particular contract. In fact, Ford Credit refuses a substantial number of contracts, although the percentage is not generally very large. In any month it rejects outright between three and eight percent of the contracts tendered to it for purchase.

All the negotiable terms of this transaction were determined totally independent of Ford Credit. Those terms are the price, down payment, interest rate, length of contract, amount of monthly payment, insurance, and the like. According to Ford Credit's files, Ford Credit had no knowledge of this transaction until the contract was tendered after it was executed by the dealer and plaintiff.

Although most of the contracts purchased by Ford Credit are on contract forms prepared and supplied

by Ford Credit to the dealers with whom it has a continuing business relationship, on occasion it buys contracts on forms supplied to the dealer by other financing institutions. Along with the tendered contract a credit statement is required, and Ford Credit supplies forms for obtaining the requested information to the dealer also. However, some dealers use their own forms regardless, and some dealers use multiple forms. Not infrequently, forms not supplied by Ford Credit are tendered with the contract.

The contract in this case was not purchased by Ford Credit until July 7, 1975, which is nine days after the date of the contract. Prior to that, Ford Credit had no rights and no obligations. As shown on the contract, the contract at that time had the name and address of the seller in the upper right-hand corner. If the copy given to plaintiff was not complete, Ford Credit had no knowledge of its incompleteness.

In the normal course, within a week after a contract is purchased, Ford Credit sends to the purchaser a payment book together with a letter advising the purchaser of its purchase of the contract. Also, at the time of purchase Ford Credit reviews the contract to determine if it complies with Truth-in-Lending. A correction notice was sent to Donna Eaton on July 8, 1975, the day after Ford Credit purchased her contract.

Whenever Ford Credit is prepaid, whether the prepayment is instigated by the customer or results from an acceleration by Ford Credit, the interest rebate is calculated and allowed in the exact same manner.

OPINION

(Filed June 16, 1977)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DONNA M. EATON,

Plaintiff,

vs.

FORD MOTOR CREDIT COMPANY,
a corporation,

Defendant.

Civil No. 76-575

Richard A. Slottee
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Portland, Or. 97204,
Attorneys for Plaintiff.

Herbert H. Anderson, John M. Berman
Dezendorf, Spears, Lubersky & Campbell
800 Pacific Building
Portland, Or. 97204,
Attorneys for Defendant.

SOLOMON, Judge:

Plaintiff filed an action for $607.84 and for reasonable attorneys' fees against the defendant, Ford Motor Credit Company (Ford), asserting that Ford violated the provisions of the Truth in Lending Act and Federal Reserve Board Regulations.

An action raising many of the same issues was decided by Judge Belloni in *Milhollin v. Dee Thomason Ford and Ford Motor Credit Co., Inc.*, Civil No. 75-334 (D.Or., filed April 7, 1976). The Magistrate had found that Ford Motor Credit Co., Inc. was a

creditor of the plaintiff, rather than an assignee of the automobile dealer, and that the transaction was governed by the provisions of the Act dealing with creditors. The Magistrate also found that Ford Motor Credit Co., Inc. failed to comply with other provisions of the Act. He therefore denied Ford Motor Credit Co., Inc.'s motion for summary judgment, and he recommended that plaintiff have a judgment against Ford Motor Credit Co., Inc. Judge Belloni reviewed the file and the record, and he granted plaintiff a judgment in accordance with the recommendations of the Magistrate. Thereafter, Ford Motor Credit Co., Inc., filed a motion to modify or vacate the judgment; and, after a hearing, Judge Belloni denied the motion.

It has been the policy and practice of this Court to respect a fully considered opinion of another Judge of this Court and to follow it unless it appears that an obvious mistake has been made. I have examined the recommendations and order of the Magistrate and the opinion of Judge Belloni in *Milhollin v. Dee Thomason Ford and Ford Motor Credit Co., Inc., supra,* and I have also carefully considered the memorandum of law submitted by counsel in this case, and I find that the conclusions reached by Judge Belloni in *Milhollin* are in accord with other federal court decisions in other jurisdictions. They also are in accord with the opinion of Judge Skopil in *Woods v. Beneficial Finance Co. of Eugene,* 395 F.Supp 9 (D.Or. 1975).

Judge Belloni's holding has been appealed and is now pending in the Ninth Circuit Court of Appeals. Because of all these facts, it would be a waste of judicial time and effort for me to set forth in detail the reasons why I believe the conclusions reached by Judge Belloni should govern this case.

There is no merit in the contention that plaintiff did not purchase the automobile primarily for personal use, nor is there any merit to the other defenses asserted by Ford.

I therefore find that plaintiff is entitled to a judgment against Ford for $607.84 and for reasonable attorneys' fees of $300.00.

Dated this 16th day of June, 1975.

/s/ Gus J. Solomon
United States District Judge

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed August 12, 1977)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DONNA M. EATON,

Plaintiff,

vs

FORD MOTOR CREDIT COMPANY, a corporation,

Defendant.

CIVIL NO. 76-575

FINDINGS OF FACT

1. This action was brought under the provisions of the Truth In Lending Act, 15 U.S.C. §1601 et seq., to recover statutory damages and attorney fees because of the defendant's violations of the Act and Federal Reserve Board Regulation Z, 12 C.F.R. §226.1 et seq. The court has jurisdiction of the action pursuant to §130(e) of the Act, 15 U.S.C. §1640(e).

2. Bud Meadows Mazda is in the business of selling automobiles and arranged for Ford Motor Credit Company to extend consumer credit to its customers to finance the purchase of automobiles.

3. Ford Motor Credit Company is a corporation engaged in the business of financing automobile purchases.

4. Plaintiff purchased an automobile from Bud Meadows Mazda for personal, non-business purposes.

5. The purchase contract was assigned by Bud Meadows Mazda to Ford Motor Credit Company simultaneously with execution, and did not:

(a) clearly identify Ford Motor Credit Company as a creditor on the face of the contract;

(b) disclose an acceleration clause on the face of the contract;

(c) clearly describe or identify the type of security interest retained; and

(d) provide the plaintiff with a duplicate of the contract.

CONCLUSIONS OF LAW

1. Ford Motor Credit Company violated the provisions of the Truth In Lending Act, 15 U.S.C. §1601 et seq., and Federal Reserve Board Regulation Z, 12 C.F.R. §226.1 et seq.

2. Plaintiff is entitled to damages from Ford Motor Credit Company of $1,000 and reasonable attorney fees of $300.

3. The Court has jurisdiction of the action pursuant to §130(e) of the Act, 15 U.S.C. §1640(e).

Dated August 12, 1977.

/s/ Gus J. Solomon
United States District Judge

JUDGMENT

(Filed and Entered August 12, 1977)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DONNA M. EATON,

Plaintiff,

vs

FORD MOTOR CREDIT COMPANY, a corporation,

Defendant.

CIVIL NO. 76-575

Based upon the record,

IT IS ADJUDGED AND ORDERED that plaintiff Donna M. Eaton have and recover from defendant Ford Motor Credit Company the sum of $1,300.

DATED this 12th day of August, 1977.

/s/ Gus J. Solomon
Judge U.S. District Court

OPINION

United States Court of Appeals, Ninth Circuit

(Decided December 28, 1978;
Reported at 588 F.2d 753)

Printed at page 42 of this Joint Appendix.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1487

FORD MOTOR CREDIT COMPANY and DEE THOMASON FORD,

Petitioners,

vs.

DENNIS MILHOLLIN and MICHELLE MILHOLLIN,

Respondents.

FORD MOTOR CREDIT COMPANY,

Petitioners,

vs.

DONNA M. EATON,

Respondent.

(Caption continued on next page)

RICHARD A. SLOTTEE
Northwestern Legal Clinic
310 Southwest Fourth Avenue
1018 Board of Trade Building
Portland, Oregon 97204

Counsel for Respondents

FORD MOTOR CREDIT COMPANY and MARV TONKIN
FORD SALES INC.,

Petitioners,

vs.

DARRELL MESSINGER,

Respondent.

FORD MOTOR CREDIT COMPANY and WEBSTER-WOLFARD
FORD, INC.,

Petitioners,

vs.

DAVID P. ANDRESEN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1487

FORD MOTOR CREDIT COMPANY and DEE THOMASON
FORD,

Petitioners,

vs.

DENNIS MILHOLLIN and MICHELLE MILHOLLIN,

Respondents.

FORD MOTOR CREDIT COMPANY,

Petitioner,

vs.

DONNA M. EATON,

Respondent.

FORD MOTOR CREDIT COMPANY and MARV TONKIN
FORD SALES INC.,

Petitioners,

vs.

DARRELL MESSINGER,

Respondent.

(Caption continued on next page)

FORD MOTOR CREDIT COMPANY and WEBSTER-WOLFARD FORD, INC.,

Petitioners,

vs.

DAVID P. ANDRESEN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents DENNIS MILHOLLIN, MICHELLE MILHOLLIN, and DONNA EATON respectfully request that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 588 F 2d 753.

QUESTIONS PRESENTED

Respondents accept the petitioners' statement of the Questions Presented, and add the following issue:

4. Whether the creditor must disclose the amount or method of computing the amount of a finance charge rebate in the event of an acceleration of the unpaid balance of the indebtedness caused by the debtor's default.

STATEMENT OF THE CASE

Respondents accept petitioners' Statement of the Case, with the following revisions:

1. The District Court held that Ford Motor was the actual creditor in the transactions involving DENNIS MILHOLLIN, MICHELLE MILHOLLIN and DONNA EATON. The automobiles were therefore purchased from Ford Motor as well as the dealers, and the contracts were executed in favor of Ford Motor.

2. The District Court ruled that DENNIS MILHOLLIN and MICHELLE MILHOLLIN could not recover damages for the failure to disclose the acceleration clause on the face of the contract, since that duty of disclosure was prospective only from the date of decision of Woods v. Beneficial Finance Company, 395 F Supp 9 (D. Or. 1975). The Ninth Circuit reversed this portion of the District Court's ruling.

3. The decision of the Ninth Circuit conflicts with the decisions of five Circuits primarily on the theory of the acceleration clause disclosure. Four of the six Circuits considering the issue have held that in certain situations an acceleration clause is a required disclosure. Two of the Circuits have rejected the conclusion. All six Circuits are in accord in rejecting the proposition that the right to accelerate is a charge required to be disclosed under §226.8(b)(4) of Regulation Z. Only one Circuit has considered and rejected the approach of the Ninth Circuit and this rejection was based on the lack of clear guidelines from the Federal Reserve Board. While the Circuits may not be in complete accord at the present time, the possibility of uniformity of decisions exists in the future.

REASONS WHY THE WRIT SHOULD BE DENIED

1. The Decision Below Was in Accord With the Pronouncements of the Federal Reserve Board.

The Federal Reserve Board has issued one staff opinion, one official interpretation, and two public information letters regarding disclosure of an acceleration clause under the provisions of the Truth in Lending Act. None of these pronouncements are in conflict with the decision below.

The first remarks of the Board were contained in a staff opinion letter issued in October of 1974. The Board equated prepayment with acceleration, and indicated that under certain circumstances an acceleration clause would have to be disclosed pursuant to §226.8(b)(7).

> For the purposes of Truth in Lending disclosures, this staff views an acceleration of payments as essentially a prepayment of the contract obligation. As such, the disclosure provisions of §226.8(b)(7) of the Regulation, which require the creditor to identify the method of rebating any unearned portion of the finance charge or to disclose that no rebate would be made, apply. If the creditor rebates under one method for acceleration and another for voluntary prepayment, both methods would need to be identified under §226.8(b)(7). Failure to disclose the method of rebate or nonrebate would be a violation of the Truth in Lending Act.
>
> Staff Op'n. Letter No. 851
> (Oct. 22, 1974), Cons. Cred.
> Guide paragraph 31, 173.

The decision below was in accord with this analysis, as it also equated prepayment with acceleration. While the Board did not directly confront the issue of disclosure where rebates under prepayment and acceleration are identical, the Ninth Circuit confronted the issue by simply extending the reasoning of the Board to its logical conclusion.

In April of 1977 the Board issued an official staff interpretation, which stated among other conclusions, that:

> You refer to a prior Public Information Letter, No. 851, which discusses the right of acceleration. Staff believes that letter addresses a different issue than the one posed in your letter. Staff understands that letter to say that early payment of the balance of a precomputed finance charge obligation by a customer upon acceleration by the creditor is essentially the same as a prepayment of the obligation. Therefore, if the creditor does not rebate unearned finance charges in accordance with the rebate provisions disclosed under §226.8(b)(7) when the customer pays the balance of the obligation upon acceleration, any amounts retained beyond those which would have been rebated under the disclosed rebate provisions do represent the type of charge that must be disclosed

> under §226.8(b)(4).
>
> No. FC-0054, 42 F.R.
> 18056 (Ap 4, 1977)
> Cons. Cred. Guide paragraph
> 31, 552.

Again, the decision below is not in conflict with this interpretation. The Board is focusing on disclosure under §226.8(b)(4), and has not confronted the issue of disclosure under §226.8(b)(7). The Ninth Circuit has simply incorporated into its decision the Board's reasoning as to the intent of §226.8(b)(7).

In 1978 the Board issued a public information letter which further clarified its reasoning as to §226.8(b)(7).

> There is an additional consideration which the staff would also call to your attention. Even where a creditor's policy is to rebate unearned finance charges in the event of prepayment upon acceleration in accordance with State law, so that no charges are retained in excess of those indicated by the disclosed rebate method, a statement in the underlying contract which apparently gives the creditor the right to retain such unearned finance charges may mislead a customer into believing that there will be no rebate upon acceleration. Such a contractual provision, if supplied to a customer with rebate method disclosure required by §226.8(b)(7) (e.g., as part of a combined note and disclosure form or where separate note and disclosure forms are presented to the customer simultaneously), would constitute additional information within the meaning of §226.6(c) of Regulation Z. If this additional information is misleading or confusing or contradicts, obscures, or detracts attention from the required §226.8(b)(7) disclosure, there would be a violation of the regulation. Of course, the capacity of the additional information to mislead or confuse can only be determined by reference to all of the circumstances of a particular case.
>
> Public Information Letter No.
> 1324, (November 14, 1978)
> Cons. Cred. Guide paragraph
> 31, 827.

As with its prior pronouncements, the Board was primarily concerned with §226.8(b)(4). However, the Board did indicate that the disclosure of an acceleration clause without a concurrent disclosure as to rebate policy under acceleration had the capacity to mislead the consumer. This is almost identical to the reasoning of the Ninth Circuit. The only dif-

ference between the Board and the Ninth Circuit is that the Board chose §226.6(c) as the basis for violation while the Ninth Circuit chose §226.8(b)(7).

The final pronouncement of the Board, a short public information letter issued in 1977, did not vary from the reasoning utilized in the other Board opinions. Public Information Letter No. 1208, (July 6, 1977) Cons. Cred. Guide paragraph 31, 647.

In all of its pronouncements the Board has declared that the right of acceleration is not a charge required to be disclosed under §226.8(b)(4). This is in accord with all six Circuits which have considered the issue. The Board has never directly considered the approach taken by the Ninth Circuit, and has never rejected that approach. While the Board has been concerned with disclosure under §226.8(b)(4), the statements and reasoning used in connection with §226.8 (b)(7) are clearly in accord with those of the decision below.

2. The Conflict Between the Circuits Is Neither as Conclusive Nor as Direct As Suggested By Petitioners.

The Third Circuit has not ruled on the issue of acceleration clause disclosure where state law does not require rebate of the unearned finance charge upon acceleration. Johnson v. McCrackin - Sturman Ford, Inc., 527 F 2d 257, 260 n. 3 (3d Cir. 1975). The Third Circuit may ultimately be in accord with the Ninth Circuit that in certain circumstances the Truth in Lending Act does require disclosure of an acceleration clause.

The District of Columbia Circuit is in accord with the Third Circuit, and ultimately may not be in conflict with the Ninth Circuit as far as disclosure of acceleration clauses under certain circumstances. Price v. Franklin Investment Co., 574 F 2d 594 (D. C. Cir. 1978).

The Fifth Circuit would also require disclosure of an acceleration clause in certain circumstances. McDaniel v.

Fulton National Bank, 576 F 2d 1156 (5th Cir. 1978).

The Eighth and Tenth Circuits stand alone in holding that an acceleration clause need not be disclosed. Griffith v. Superior Ford, 577 F. 2d 455 (8th Cir. 1978); Begay v. Ziems Motor Co., 550 F. 2d 1244 (10th Cir. 1977).

3. The Decision Below Was Correct and In Accord With the Provision of the Truth in Lending Act and Regulation Z.

It is undisputed that §226.8(b)(7) requires disclosure of the amount or method of computing the amount of the finance charge rebate in the event of prepayment. It is clear that the Federal Reserve Board, which has been charged with interpretating and enforcing Regulation Z, equates prepayment with acceleration. Given these two factors, the decision below that the Truth in Lending Act requires disclosure of the effect on the finance charge rebate in the event of acceleration is logical and compelling.

Petitioners state that few creditors could have foreseen the ruling of the Ninth Circuit and that these heretofore unforeseen violations may result in huge penalties being imposed against creditors. Fear of imposing financial penalties against the credit industry should not be a reason for the Court's intervention in this matter. Further, the decision below was certainly not unforeseen. In Oregon, the acceleration clause has been a required disclosure since 1975. Woods v. Beneficial Finance Co., 395 F Supp. 9 (D. Or. 1975). As early as 1974, other District Courts were holding that an acceleration clause was a required disclosure. Pugh v. American Tractor Trailer Training, Inc., Cons. Cred. Guide paragraph 98, 827 (D. Conn. 1974). Respondents suggest that the petitioner's claim of surprise is more properly just a statement that they disagree with the decision below.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully Submitted,

Richard A Slottee

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Portland, Oregon 97204

Counsel for Respondents
Milholline and Eaton

7.

IN THE

Supreme Court of the United States

October Term, 1979
No. 78-1487

FORD MOTOR CREDIT COMPANY, *et al.*,
Petitioners,

vs.

DENNIS MILHOLLIN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE PETITIONERS

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IN THE

Supreme Court of the United States

October Term, 1979
No. 78-1487

FORD MOTOR CREDIT COMPANY, *et al.*,

Petitioners,

vs.

DENNIS MILHOLLIN, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE PETITIONERS

Opinions Below

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 588 F.2d 753 and is reproduced in the Joint Appendix at pages 42 to 54.[1] The opinions, orders and judgments of the United States District Court for the District of Oregon are not reported and are reproduced in the Joint Appendix at pages 26 to 41 and 69 to 74.

[1] The Joint Appendix will be referred to herein as "J.A." The Appendix to the Brief will be referred to as "App." The Record on Appeal will be referred to herein as "R.A."

Jurisdiction

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on December 28, 1978. The Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit was filed on March 27, 1979 and was granted on June 18, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

Statutory Provisions and Regulations Involved

Truth in Lending Act § 128(a)(9), 15 U.S.C. § 1638(a)(9) (1976):

> "(a) In connection with each consumer credit sale not under an open end credit plan, the creditor shall disclose each of the following items which is applicable:
>
> . . . .
>
> (9) The default, delinquency, or similar charges payable in the event of late payments."

Regulation Z, 12 C.F.R. § 226.8(b)(4) (1978):

> "(b) In any transaction subject to this section, the following items, as applicable, shall be disclosed:
>
> . . . .
>
> (4) The amount, or method of computing the amount, of any default, delinquency, or similar charges payable in the event of late payments."

Regulation Z, 12 C.F.R. § 226.8(b)(7) (1978):

> "(b) In any transaction subject to this section, the following items, as applicable, shall be disclosed:
>
> . . . .

> (7) Identification of the method of computing any unearned portion of the finance charge in the event of prepayment in full of an obligation which includes precomputed finance charges and a statement of the amount or method of computation of any charge that may be deducted from the amount of any rebate of such unearned finance charge that will be credited to the obligation or refunded to the customer. If the credit contract does not provide for any rebate of unearned finance charges upon prepayment in full, this fact shall be disclosed."

Questions Presented

These cases arise under Title I of the Consumer Credit Protection Act, 15 U.S.C. §§ 1601 *et seq.* (1976), popularly known as the "Truth in Lending Act" (herein "the Act"),[2] and Regulation Z, 12 C.F.R. § 226 (1978) (herein "the Regulation"), promulgated by the Federal Reserve Board to implement the Act.

In any consumer credit transaction subject to the Act, the Act and the Regulation require the creditor to disclose to the consumer, prior to the extension of credit, certain information regarding the terms of the proposed transaction. The issues involved in these cases relate to whether any disclosures are required under the Act or the Regulation by reason of the existence in a consumer credit contract of an acceleration clause which permits the creditor to declare all unpaid installments to be immediately due and payable

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[2]A Legislative History of the Act is attached to this Brief as Appendix A.

in the event of a default by the consumer. The questions presented are:

1. Whether the existence of an acceleration clause in a consumer credit contract must be disclosed under Section 128(a)(9) of the Act or Section 226.8(b)(4) of the Regulation as a default, delinquency or similar charge payable in the event of late payments.

2. Whether default, delinquency or similar charge disclosures are required with respect to an acceleration clause under Section 128(a)(9) of the Act or Section 226.8(b)(4) of the Regulation if the creditor rebates unearned finance charges upon payment of the indebtedness after acceleration in the same manner that it rebates unearned finance charges upon prepayment of the indebtedness where there has been no acceleration.

3. Whether a creditor's acceleration of a consumer credit indebtedness upon default is itself a "prepayment" of the indebtedness within the meaning of Section 226.8(b)(7) of the Regulation.

4. Whether the creditor's method of rebating unearned finance charges upon payment of an indebtedness after acceleration must be separately disclosed under Section 226.8(b)(7) of the Regulation where the creditor's rebate disclosure applicable to prepayment applies to payment in full both before and after acceleration.

5. What judicial deference and effect should be given to both official and unofficial Federal Reserve Board Staff Interpretations of the foregoing Sections of the Act and the Regulation that deal specifically with all of the foregoing questions.

Statement of the Case

These cases began with two separate actions, one brought by Respondents Dennis and Michelle Milhollin (herein "the Milhollins") and the other by Respondent Donna M. Eaton (herein "Eaton"), in the United States District Court for the District of Oregon. The actions were brought against two automobile dealers and Ford Motor Credit Company (herein "Ford Credit"). Jurisdiction was based upon Section 130(e) of the Act, 15 U.S.C. § 1640(e) (1976). [J.A. 3, 56] The factual and legal issues presented by the two cases are in most respects identical.

Both the Milhollins and Eaton (herein "the Buyers") purchased an automobile from a dealer. As a part of each transaction, the Buyers paid the dealer a downpayment and signed an installment sale contract in favor of the dealer for the balance of the purchase price. The contracts included finance charges that were precomputed on the assumption that all payments would be made as scheduled. The precomputed finance charges, together with certain other charges, were added to the unpaid balance of the cash price to form the total precomputed contract balance. The Buyers were obligated to pay the balance in monthly installments over a specified period of time. In both cases, the contracts were subsequently assigned by the dealers to Ford Credit. [J.A. 4, 11-12, 57, 62]

The installment sale contracts signed by the Buyers consisted of single-page printed forms that were pre-

pared specifically for use in connection with installment sales of automobiles subject to the Act. [J.A. 9-10, 65-66] The terms and conditions of the sale were contained on both sides of the page. Consistent with Section 226.8(a) of the Regulation, 12 C.F.R. § 226.8(a) (1978), which requires all truth in lending disclosures to be made on the same side of a single page, the front side of the contract also served as the "disclosure statement" required under the Act. In both cases, the same form of contract was used. [J.A. 9-10, 65-66]

Paragraph 14 on the front side of the contract contains the following provision dealing with the buyer's right to a rebate of unearned finance charges in the event of a prepayment of the obligation:

> "(14) Prepayment Rebate: Buyer may prepay his obligations under this contract in full at any time prior to maturity of the final instalment hereunder, and, if he does so, shall receive a rebate of the unearned portion of the Finance Charge computed under the sum of the digits method after first deducting an acquisition fee of $15.00. No rebate will be made if the amount is less than $1.00." [J.A. 9, 65]

This provision applies to prepayment of the indebtedness in full and does not differentiate between a prepayment that occurs after an acceleration of the installment due dates and a prepayment that occurs where there has been no such acceleration. This provision is in compliance with Oregon state law, which requires the holder of the contract to rebate unearned finance charges upon prepayment of the contract indebtedness regardless of whether the prepayment occurs before

or after an acceleration of the installment due dates.[3] Ford Credit's practice in all cases is to rebate unearned finance charges upon prepayment of the indebtedness after an acceleration in the same manner that it rebates unearned finance charges upon prepayment where there has been no acceleration. [J.A. 22, 68][4]

Paragraph 12 on the front side of the contract discloses default and delinquency charges as follows:

> "(12) Delinquency Charges: Buyer hereby agrees to pay a delinquency charge on each instalment in default for more than 10 days in the amount of 5% thereof or $5.00, whichever is less, plus such expenses incurred by Seller in effect-

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[3]The Oregon motor vehicle financing statute requires a rebate of unearned finance charges if the debtor prepays a retail installment contract in full after acceleration. Section 83.620(1) of the Oregon Revised Statutes provides:

> "Notwithstanding the provisions of a retail instalment contract to the contrary, the buyer may pay in full at any time before maturity the obligation contained in the retail instalment contract. Upon such premature prepayment, the buyer shall receive a refund credit." O.R.S. § 83.620(1) (Or. L. 1977).

The caption to this section refers to "Voluntary prepayment by buyer; refund." However, the caption was not a part of the legislative enactment, but was added by the legislative counsel who compiles the statutes for publication. *See* Or. L. 1977, ch. 692, § 1; Or. L. 1957, ch. 625, § 24. Under Oregon law, the caption added by the compiler of the statutes "does not constitute any part of the law." O.R.S. § 174.540 (1977-1978).

[4]In *Griffith v. Superior Ford,* 577 F.2d 455 (8th Cir. 1978), a case involving a similar Ford Credit form of contract and Ford Credit's identical policy with respect to rebating unearned finance charges upon payment following acceleration, the Eighth Circuit noted: "It is undisputed that the creditor's policy in this case is to rebate upon prepayment after acceleration in accordance with the rebate method shown on the disclosure statement." 577 F.2d at 460 n.6.

ing collection hereunder as may be allowed by law." [J.A. 9, 65]

Paragraph 19 on the reverse side of the contract sets forth the rights and remedies of the holder of the contract upon the buyer's default, such as: the right to accelerate the due date of all unpaid installments; the right to repossess the motor vehicle; the right to pursue remedies under the Uniform Commercial Code; the right to sell the motor vehicle at public or private sale; and the right to recover a deficiency judgment. [J.A. 10, 66] The acceleration remedy is set forth in the following terms:

> "In the event Buyer defaults in any payment, . . . or fails to comply with any other provisions hereof . . ., Seller shall have the right to declare all amounts due or to become due hereunder to be immediately due and payable. . . ." [J.A. 10, 66]

These contractual remedies upon default are not separately disclosed on the front side of the contract.

The Buyers fell behind in the payment of the contract installments. Ultimately, Ford Credit repossessed the motor vehicles. In the *Milhollin* case, the motor vehicle was resold after repossession. [J.A. 16-17, 27] In the *Eaton* case, the motor vehicle was retained by Ford Credit in full satisfaction of the unpaid indebtedness pursuant to Oregon law. O.R.S. § 79.5050 (1977-1978) [R.A. 70]

The Buyers then filed suit against the dealers and Ford Credit alleging violations of the Act and the Regulation and seeking statutory damages, attorney's fees and costs of suit. [J.A. 6-7, 59] In both cases, the dealers and Ford Credit were alleged to have violated

the Act and the Regulation by failing to disclose on the front side of the contract the existence of the acceleration clause. The Buyers alleged that the right of acceleration is a "default, delinquency or similar charge" within the meaning of Section 128(a)(9) of the Act and Section 226.8(b)(4) of the Regulation. [J.A. 5, 58][5] The Buyers did not allege or argue in the trial court that the dealers or Ford Credit had violated Section 226.8(b)(7) of the Regulation dealing with prepayment disclosures.

The trial courts concluded that the Act and the Regulation had been violated.[6] The courts held that the disclosure statements did not properly identify Ford Credit as a "creditor" and did not adequately describe the security interests. [J.A. 28-30, 32-35, 72-73] With respect to the acceleration clause, the courts held that the case of *Woods v. Beneficial Finance Co.*, 395 F. Supp. 9 (D. Ore. 1975) was controlling as a matter of "*stare decisis* and logic." [J.A. 30] In *Woods*, the Court held that, although an acceleration clause is not a "default, delinquency or similar charge" that must be disclosed under Section 226.8(b)(4) of the Regulation, it is such an important term of the contract that "henceforth a creditor must disclose and fully explain any right of acceleration in order to comply with the 'meaningful disclosure' standards of the Act." 395 F. Supp. at 16. Since the credit contract was signed by the Milhollins before the *Woods* decision

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[5]The Buyers in both cases alleged numerous other violations of the Act and the Regulation. [J.A. 5, 57-59]

[6]The decision in the *Milhollin* case was reached upon the basis of the recommendations and order of a special magistrate. [J.A. 26-37] In the *Eaton* case, the court followed the *Milhollin* decision without independent analysis. [J.A. 69-71]

was issued,[7] the court in the *Milhollin* case ruled against the Milhollins on the acceleration issue. [J.A. 31] However, in the *Eaton* case the contract had been signed after the *Woods* decision was filed[8] and the court therefore ruled in favor of Eaton on this issue. [J.A. 73]

Based upon the violations of the Act and the Regulation found by the courts, a judgment for the maximum statutory damages of $1,000 and for attorney's fees, 15 U.S.C. § 1640(a) (1976), was entered against the dealer and Ford Credit in *Milhollin* and against Ford Credit alone in *Eaton*. [J.A. 41, 73, 74][9]

Both cases were appealed to the United States Court of Appeals for the Ninth Circuit. The cases were consolidated for argument because of the common questions of law they presented. The cases were also consolidated for argument with two other truth in lending actions brought against Ford Credit in which the trial courts had ruled against Ford Credit solely upon the basis that it had not been properly identified as a "creditor" in the transactions. *Andresen v. Ford Motor Credit Company*, Civ. No. 76-1090 (D. Ore., filed July 26, 1977) (opinion and judgment reprinted at pages 30a-34a of the Appendix to the Petition for a Writ of Certiorari); *Messinger v. Ford Motor Credit Company*, Civ. No. 76-475 (D. Ore., filed July 26,

[7]The *Woods* decision was filed on February 14, 1975. 395 F. Supp. 9 (D. Ore. 1975). The installment contract was signed by the Milhollins on July 12, 1974. [J.A. 9.]

[8]The installment contract was signed by Eaton on June 28, 1975. [J.A. 65]

[9]The dealer had been voluntarily dismissed from the *Eaton* case. [J.A. 60]

1977) (opinion, judgment and order reprinted at pages 35a-39a of the Appendix to the Petition for a Writ of Certiorari).

The Ninth Circuit's opinion was filed on December 28, 1978. Without deciding whether Ford Credit was a "creditor" for purposes of the Act or the Regulation, the court held that its identity was adequately disclosed on the front of the contracts. *Milhollin v. Ford Motor Credit Co.*, 588 F.2d 753, 755-57 (9th Cir. 1978). [J.A. 48] Upon this basis, the court reversed the decisions in the *Andresen* and *Messinger* cases and remanded those cases for a consideration of the other alleged violations of the Act and the Regulation. 588 F.2d at 758. [J.A. 53] However, relying solely upon the Ninth Circuit's earlier decision in *St. Germain v. Bank of Hawaii*, 573 F.2d 572 (9th Cir. 1977), the court held that Ford Credit had violated the Act and the Regulation in the *Milhollin* and *Eaton* cases by failing to disclose the acceleration clause under the prepayment disclosure provisions of Section 226.8(b)(7) of the Regulation. 588 F.2d at 758-59. [J.A. 50-51] The court therefore affirmed the decisions in *Milhollin* and *Eaton* and held that Ford Credit was liable to the Milhollins and Eaton for failure to disclose the acceleration clause. *Id.* [J.A. 53-54]

The dealer and Ford Credit timely filed with this Court their Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. No Petition or Cross-Petition for a Writ of Certiorari was filed by any of the plaintiffs in the four cases that had been consolidated for argument and decision. On June 18, 1979, this Court granted the Petition for a Writ of Certiorari.

Summary of Argument

The issue in these cases is whether an acceleration clause in a consumer credit contract must be disclosed under the Act or the Regulation. The Act and the Regulation describe with great particularity the various disclosures that are required to be made, in some cases even dictating the precise terminology that must be used. *See, e.g.,* Regulation Z, 12 C.F.R. §§ 226.8 (b), 226.8(c), 226.8(d) (1978). It is significant that, although specific numerical and descriptive disclosures are prescribed, neither the Act nor the Regulation specifically requires the disclosure of the existence of an acceleration clause.

Finding no provision of the Act or the Regulation expressly requiring the disclosure of acceleration clauses, the Buyers have relied upon two different Sections of the Regulation to argue that acceleration disclosures are nevertheless required. The Buyers have relied upon Section 226.8(b)(4) requiring disclosure of "the amount, or method of computing the amount, of any default, delinquency or similar charges payable in the event of late payments" and Section 226.8(b)(7) requiring disclosure of the creditor's rebate policy upon prepayment of a precomputed contract.

The Buyers have argued that the right of acceleration is a "default, delinquency or similar charge" that must be disclosed under Section 226.8(b)(4) of the Regulation. This argument finds no support in the plain meaning of the terms used in the Act and the Regulation. The terms default, delinquency and similar charges have a commonly accepted meaning in the consumer credit industry. They refer to specific pecuniary sums assessed as a result of the late payment of contract

installments. These charges are imposed upon the debtor *in lieu of acceleration* and serve to compensate the creditor for any delay in receiving installment payments.

The Buyers' argument that the right of acceleration must be disclosed as a "default, delinquency or similar charge" has been rejected by the Federal Reserve Board in an Official Staff Interpretation issued pursuant to express interpretive powers granted to the Board in the Act itself. The Official Staff Interpretation provides that the phrase "default, delinquency or similar charges" applies only to specific pecuniary sums payable in the event of the late payment of contract installments.

The Official Staff Interpretation also states that Section 226.8(b)(4) of the Regulation does not require default charge disclosures with respect to an acceleration clause as long as the creditor rebates unearned finance charges upon payment of the indebtedness after acceleration in the same manner that it rebates unearned finance charges upon voluntary prepayment where there has been no acceleration. It is undisputed that, pursuant to the contracts and Oregon state law, Ford Credit rebates unearned finance charges upon payment of the indebtedness following acceleration in the same manner that it rebates unearned finance charges upon prepayment of the indebtedness where there has been no acceleration. Applying the Board's interpretation, no default charge disclosure with respect to the acceleration clause is required under Section 226.8(b)(4) of the Regulation.

The Buyers' argument that the existence of an acceleration clause must be disclosed as a "default, delinquency or similar charge" has also been considered by the United States Court of Appeals for seven differ-

ent circuits. All seven circuits have rejected the argument. The circuits have not uniformly accepted the Board's Official Staff Interpretation that a "charge" is imposed and must be disclosed if the creditor does not rebate unearned finance charges upon payment of the indebtedness after acceleration. Some of the circuit courts, including the court below, have rejected this interpretation and held that such disclosures are never required under Section 226.8(b)(4) regardless of the creditor's rebate practice. However, the circuits are unanimous in holding that where, as here, a creditor is required to rebate unearned finance charges upon payment of the indebtedness following acceleration, no charge is imposed and no disclosures are required under Section 226.8(b)(4).

Section 226.8(b)(7) of the Regulation requires the creditor to disclose whether it rebates unearned finance charges upon prepayment of a precomputed contract and, if so, what method of rebate is employed. In an Official Staff Interpretation, the Board has stated that the creditor's method of rebating unearned finance charges upon payment of the indebtedness after acceleration need not be separately disclosed where it is the same as the disclosed method of rebate applicable to voluntary prepayment. Ford Credit's rebate policy applicable to payment of the contracts after acceleration is the same as its rebate policy applicable to voluntary prepayment; and this rebate policy is disclosed on the front of the contracts. The disclosure statements used in these cases thus comply with Section 226.8 (b)(7) of the Regulation and with the Board's Official Staff Interpretation of this Section.

Section 226.8(b)(7) was brought into these cases only after they had been appealed to the Ninth Circuit.

In holding that Ford Credit had violated the Act and the Regulation, the Ninth Circuit relied solely upon its earlier decision in *St. Germain v. Bank of Hawaii*, 573 F.2d 572 (9th Cir. 1977). In the *St. Germain* case, the court held that an acceleration is a prepayment so that Section 226.8(b)(7) of the Regulation requires a creditor to disclose its method of rebate upon acceleration of a consumer credit contract. In effect, the court held that when a creditor demands payment of a contract balance, that demand is treated as a full payment of the contract balance for purposes of Section 226.8 (b)(7) of the Regulation. The court's decision in *St. Germain* is in conflict with the plain meaning of the term "prepayment" as used in Section 226.8(b)(7) and it also conflicts with the Board's Official Staff Interpretation of its own Regulation.[10]

The court's unprecedented and illogical holding in *St. Germain* has thrown open to question the validity of millions of disclosure forms drafted in careful compliance with the Regulation as interpreted by the Board. The court's failure to follow the Board's Official Staff Interpretation of its own Regulation violates established rules of judicial deference relating to agency interpretations. Congress has made these rules of judicial deference applicable to the Federal Reserve Board in the specific context of the Act and the Regulation.

The decision of the Ninth Circuit simply substitutes judicial disclosure preference for the express disclosure

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[10]In *St. Germain*, as in these cases, the plaintiff only alleged a violation of Section 226.8(b)(4) of the Regulation relating to default, delinquency or similar charges. The plaintiff did not allege in his complaint or argue in the trial court any violation of Section 226.8(b)(7) of the Regulation relating to prepayment disclosures. In fact, the Ninth Circuit injected this issue into the case after oral argument and without the benefit of any briefing or argument by the parties.

requirements of the Act and the Regulation as interpreted by the Board. This misguided approach threatens the disclosure uniformity intended by Congress in passing the Act and undermines the central purpose of the Act which is "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit." Act § 102(a), 15 U.S.C. § 1601(a) (1976).

This Court should reaffirm the authority of the Federal Reserve Board to interpret and administer the Act and the Regulation and should reject those lower court decisions that have filled in perceived disclosure gaps in the Act and the Regulation by adding disclosure requirements not imposed by the Congress or the Board.

ARGUMENT

I

INTRODUCTORY STATEMENT

Although these cases are limited to issues arising under the Truth in Lending Act and the dollar amount involved in each case is small, it would be misleading to ignore the staggering volume of transactions that are subject to the Act and the Regulation and to which the principles adopted in these cases will apply. There are an estimated 60,000,000 consumer credit contracts outstanding in the United States today representing more than $265,000,000,000 in total consumer installment indebtedness.[11] Although these contracts vary significantly in their credit terms, they all contain one clause in common: an acceleration clause.[12] The issue in these cases is whether the presence of an acceleration clause in a consumer credit contract triggers any disclosure requirements under the Act or the Regulation. This Court's decision on this issue will affect millions of consumer installment contracts subject to the Act and the Regulation.

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[11] According to the Federal Reserve Board, total consumer installment indebtedness outstanding in the United States during November of 1978 was $269,445,000,000. 65 Federal Reserve Bulletin A42 (Table 1.55) (1979). Although no exact figures are available with respect to the total number of individual transactions that comprise this total, the amount of the average transaction appears to be less than $4,000. *See* Finance Facts Yearbook 1977, pp. 46-47 (published by the Consumer Credit Education Foundation, Library of Congress Catalog Card No. 61-14409). Based on this average, the estimate of 60,000,000 separate transactions is probably conservative.

[12] *See Johnson v. McCrackin-Sturman Ford, Inc.*, 527 F.2d 257, 264 (3d Cir. 1975); II G. Gilmore, Security Interests in Personal Property 1195 (1965) ("For a hundred years, it may be, no security agreement has failed to include an acceleration clause.").

The Court's decision in these cases could provide much needed guidance to the lower courts in interpreting the disclosure requirements of this complex Act and Regulation. The central purpose of the Act is to require the uniform disclosure of certain essential credit costs so that consumers can meaningfully comparison shop for credit. This purpose has been frustrated by court decisions that have imposed disclosure obligations upon creditors that are not explicitly or implicitly required by the Act or the Regulation.

The decision in these cases could also have far-reaching implications in defining the respective roles that the Federal Reserve Board and the courts should play in interpreting the Act and the Regulation. Congress delegated to the Board broad authority to implement, administer and interpret the Act and the Regulation. It was hoped that by placing these responsibilities with the Board, the Congressional goal of providing simple and uniform credit cost disclosures could be best achieved. This Court has recognized the broad authority conferred upon the Board by Congress and has afforded wide latitude to the Board in discharging its responsibilities under the Act. *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356 (1973).

These efforts by Congress to promote simplicity and uniformity have been seriously undermined by court decisions, such as the decision below, that have rejected the Board's interpretations and substituted judicial disclosure preference for the express requirements of the Act and the Regulation. This *ad hoc* judicial approach has resulted in widespread conflict in the federal courts concerning the proper interpretation of the disclosure requirements of the Act and the Regulation. This conflict is well illustrated by the conflict in the circuit

courts on the issues in these cases.[18] The resulting confusion has left creditors with no guidance as to what disclosures are required under the Act and the Regulation. Consumers are being supplied with a bewildering array of lengthy and complex disclosure forms by creditors who are striving in good faith to satisfy the wide variety of disclosure rules imposed by the courts. This defeats the central purpose of the Act which is to provide consumers with simple and uniform credit cost disclosures so that they can meaningfully comparison shop for credit.

This Court should reverse the decision of the lower court. The disclosure statements used in these cases provided the Buyers with all of the disclosures required by the Act and the Regulation. The disclosure statements also comply with an Official Staff Interpretation of the Act and the Regulation issued by the Federal Reserve Board pursuant to express interpretive powers granted to the Board by Congress. In rejecting this Interpretation, the lower court failed to apply established rules of judicial deference to agency interpretations as recently articulated by this Court

[18] "During the past forty months, the United States Courts of Appeal for six different Circuits have examined the application of the Act and Regulation Z to acceleration clauses in consumer credit contracts. Despite the clarity of the Board's position, none of the Circuits have adopted that position in total. The Board's position has been rejected by the Ninth and Tenth Circuits, partially rejected by the Fifth Circuit, and partially followed by the Third, Fifth and District of Columbia Circuits. The Ninth Circuit has rejected decisions by the Third, Fifth and Tenth Circuits; the Eighth Circuit has rejected the approach of both the Ninth and the Fifth Circuits; the Tenth Circuit has rejected the views of the Third Circuit; and the Fifth Circuit has issued six separate, internally conflicting opinions." Petition for a Writ of Certiorari at 10, *Ford Motor Credit Company, et al. v. Milhollin, et al.*, No. 78-1487 (March 27, 1979).

in the specific context of the Act and the Regulation. *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356 (1973).

II

THE INTERPRETATIONS OF THE REGULATION BY THE FEDERAL RESERVE BOARD ARE ENTITLED TO GREAT DEFERENCE AND SHOULD BE FOLLOWED BY THE COURTS UNLESS PLAINLY ERRONEOUS

In discharging its responsibilities under the Act, the Federal Reserve Board drafted a comprehensive Regulation dealing with the disclosure of credit terms in consumer credit transactions. Despite the detail and breadth of the Regulation, questions of interpretation were unavoidable both because of the complex and technical nature of the Regulation and the wide variety of credit terms offered by creditors.

In order to facilitate and encourage compliance with the Regulation, the Board has, throughout the past decade, issued various types of clarifying interpretations. In fact, each of the questions presented for decision in these cases has been specifically addressed and answered through both official and unofficial staff interpretations. Under well established principles articulated by this Court and in conformity with clearly expressed Congressional intent, these interpretations of the Board are entitled to great deference and should be followed.

A. Administrative Agencies Are Accorded Wide Latitude in Interpreting Statutes and Regulations

This Court has frequently held that the interpretations of an act by the officers or agency responsible for its administration are entitled to great deference. As long as the agency interpretation represents a reason-

able construction of the act, it should be followed even if other equally plausible interpretations are available and may even be preferred by the reviewing court. *E.g., Zenith Radio Corp. v. United States,* 437 U.S. 443, 450-51 (1978); *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 371-72 (1973); *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971); *Power Reactor Development Co. v. Electricians,* 367 U.S. 396, 408 (1961); *Udall v. Tallman,* 380 U.S. 1, 16-17 (1965).

This rule of judicial deference to agency interpretations is especially applicable where the administrative agency is interpreting its own regulation. In this context, "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). *See also Thorpe v. Housing Authority,* 393 U.S. 268, 276 (1969); *Udall v. Tallman,* 380 U.S. 1, 16-17 (1965).

B. This Rule of Judicial Deference Is Especially Applicable to Interpretations of the Regulation by the Federal Reserve Board

Application of the rule of deference to interpretations of the Act and the Regulation by the Board is supported by compelling policy considerations.

1. Congress Has Granted Broad Interpretive Powers to the Federal Reserve Board

The sole responsibility for the implementation, administration and interpretation of the Act was placed with the Board. Congress drafted the Act in broad terms and charged the Board with the task of construing

the Act and determining what specific disclosures should be required. Act § 105, 15 U.S.C. § 1604 (1976). The broad interpretive powers that Congress conferred upon the Board are well-documented by the legislative history of the Act [App. A at 10-17] and have been confirmed by this Court. *See Mourning v. Family Publications Service, Inc.*, 411 U.S. 356 (1973).

Congress has recently reaffirmed the central role that it intended the Board to occupy in interpreting and administering the Act. In 1974, the Act was amended by adding Section 130(f) which provided that no civil liability may be imposed on a creditor whose forms were prepared in conformity with "any rule, regulation, or interpretation thereof by the Board." Act of October 28, 1974, Pub. L. No. 93-495, § 406, 88 Stat. 1518 (current version at 15 U.S.C. § 1640(f)). The Report of the Senate Committee concerning this new Section of the Act explained that it had a dual purpose. First, the Section was intended to protect creditors against civil liability where their disclosure forms were in conformity with Board interpretations of the Act and the Regulation. [App. A at 14] Second, and equally important, the Section was intended to encourage the Board to exercise its broad interpretative powers to simplify and standardize disclosure requirements, thus reducing the compliance burden on creditors while at the same time making disclosures more uniform and understandable to consumers. [App. A at 14-15]

In 1976, Section 130(f) was amended so that its protections would apply not only to Board interpretations, but also to "any interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the Board to issue such interpretations or approvals under such procedures as the Board may prescribe therefor . . . ." Pub. L. No. 94-222, 90 Stat. 197 (codified at 15 U.S.C. § 1640(f) (1976)).

The express terms of the Act and its legislative history thus evince a clear Congressional desire that the Board be afforded wide latitude in interpreting the disclosure requirements of the Act and the Regulation. This Congressional intent should not be disregarded by the courts. The interpretations of the Board should be followed unless they are plainly erroneous.

2. A Rule of Special Deference to the Federal Reserve Board Will Promote the Overriding Purpose of Uniformity in Credit Cost Disclosures

The central purpose of the Act is to require uniform credit cost disclosures so that the consumer can be given meaningful information that will permit him to comparison shop for credit. Act § 102(a), 15 U.S.C. § 1601(a) (1976). The Committee Report accompanying the original House Bill makes this point forcefully:

> "The committee believes that by requiring all creditors to disclose credit information in a uniform manner, and by requiring all additional mandatory charges imposed by the creditor as an incident to credit be included in the computation of the applicable percentage rate, the American consumer will be given the information he needs to compare the cost of credit and to make the best informed decision on the use of credit." H.R. Rep. No. 1040, 90th Cong., 1st Sess. 13 (1967).

Section 130(f) was added to the Act in 1974 and was amended in 1976 for the express purpose of provid-

ing the Board and its staff with the authority necessary to promote the Congressional goal of uniformity.

Only a rule of affording great deference to Board interpretations will permit the goal of uniformity to be realized. If the courts are allowed to substitute judicial disclosure preference for the clear requirements of the Act and the Regulation as interpreted by the Board, the confusion and uncertainty that has brought these cases to this Court will continue, and will undoubtedly worsen.

3. The Federal Reserve Board Possesses the Unique Level of Expertise Necessary to Interpret the Technical Requirements of the Act and the Regulation

In the execution of its responsibilities under the Act, the Board has been able to draw upon an accumulation of information and resources that are not readily accessible to courts in the traditional adversary setting.[14] In doing so, the Board has developed a level of expertise in the complex task of regulating credit disclosures that is not easily achieved by courts of general jurisdiction which are presented with isolated questions arising under the Act and Regulation only on a sporadic basis.

The Board's special expertise has enabled it to make informed policy decisions about the disclosure requirements necessary to implement the purposes of the Act. This specialized expertise has been acknowledged by this Court. *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 365 (1973). In *Bone v. Hibernia*

[14] In issuing interpretations, the Board has adopted procedures aimed at gathering relevant data and comments from all interested parties. Regulation Z, 12 C.F.R. § 226.1(d) (1978).

Bank, 493 F.2d 135 (9th Cir. 1974), the Ninth Circuit also acknowledged this expertise in deferring to an Official Board Interpretation of Section 226.8(b)(7) of the Regulation:

> "We believe that it is precisely these kinds of policy decisions about the disclosure statement, requiring the weighing and balancing of the various available choices, that Congress entrusted to the Federal Reserve Board by granting it such broad powers. The conclusions thus reached by the Board are based upon its specialized experience and access to information, which is not likely to come to the attention of a particular judge in a given case. While reasonable minds may differ as to which alternative would best suit the purposes of the Act, 'courts should defer to the informed experience and judgment of the agency to whom Congress delegated appropriate authority.' *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 372, 93 S. Ct. 1652, 1662, 36 L. Ed. 2d 318 (1973)." 493 F.2d at 140.

Application of a rule of special deference to Board interpretations, especially those of an official nature, both recognizes this specialized expertise and provides the Board with the flexibility necessary to respond to changing credit practices and disclosure needs.

4. Important Reliance Interests Will Be Protected by a Rule of Special Deference

This Court has recognized that special deference may be appropriate with respect to an agency interpretation where reliance interests are likely to have intervened. *See Train v. Natural Resources Defense Council*, 421 U.S. 60, 87 (1975); *Udall v. Tallman*, 380 U.S.

1, 18 (1965). Substantial policy considerations, grounded in concepts of fairness, support this rule of special deference where reliance interests have intervened. These policy considerations are especially applicable to Board interpretations of the Act and the Regulation.

Creditors must comply with the disclosure requirements of the Act and the Regulation or be subject to severe penalties, including potentially enormous class action claims.[15] Relying upon Board interpretations, printed forms have been developed by creditors who have attempted in good faith to comply with the Act and the Regulation. These forms have been used in the literally millions of consumer credit transactions that are entered into each year. Absolute chaos will result if courts "second-guess" the Board and adopt a construction of the Act or the Regulation that is inconsistent with a Board interpretation. Creditors attempting in good faith to comply with the law could place no confidence in the Board's uniform guidelines offered to assist them and instead would be subject to the vagaries of conflicting and unpredictable interpretations of the Act and the Regulation by trial and appellate courts across the land.[16]

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[15]Under Section 130(a)(2)(B) of the Act, 15 U.S.C. § 1640 (a)(2)(B) (1976), a creditor is exposed to class action liability of up to the lesser of $500,000 or 1% of the creditor's net worth.

[16]Although Section 130(f) of the Act provides a measure of protection against civil liability where a disclosure is found to be in conformity with an Official Board or Staff Interpretation, this Section does not apply to unofficial Staff Interpretations and is clouded by the uncertain requirement that the creditor act "in good faith." *See Basham v. Finance America Corp.*, 583 F.2d 918, 923 n.7 (7th Cir. 1978), *cert. denied,* 99 S.Ct. 1046 (1979), suggesting that a creditor may not be acting in good faith if at least one circuit court has declined to follow a Board interpretation.

C. This Court Should Resolve the Conflict in the Circuits Concerning the Weight to Be Accorded Federal Reserve Board Interpretations of Its Regulation

Despite the considerations discussed above and the critical need for certainty concerning the weight to be given Board interpretations, the circuits are badly split on this issue. This conflict is best illustrated by the position taken by the circuits on the very issues presented in these cases.

The Board has issued an Official Staff Interpretation and several Staff Letters concerning the disclosure requirements incident to an acceleration clause in a consumer credit contract.[17] The Third and District of Columbia Circuits appear to have accepted the Board's position. *Johnson v. McCrackin-Sturman Ford, Inc.*, 527 F.2d 257 (3d Cir. 1975); *Price v. Franklin Investment Co., Inc.*, 574 F.2d 594 (D.C. Cir. 1978). The Tenth Circuit has rejected the Board's position. *Begay v. Ziems Motor Co.*, 550 F.2d 1244 (10th Cir. 1977). The Fifth Circuit initially rejected the Board's position, *Martin v. Commercial Securities Co., Inc.*, 539 F.2d 521 (5th Cir. 1976), later reversed itself prospectively and adopted the Board's position as the "rule of decision," *McDaniel v. Fulton National Bank,* 571 F.2d 948, 951 (5th Cir. 1978) (*en banc*) and has since retreated slightly from the Board's position. *McDaniel v. Fulton National Bank,* 576 F.2d 1156 (5th Cir. 1978) (opinion on denial of rehearing *en banc*). The Ninth Circuit has partially followed the Board's position and partially rejected it. *St. Ger-*

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[17]These interpretations are reproduced in Appendix B to this Brief and are discussed in parts IV B and V B of the Brief.

main v. Bank of Hawaii, 573 F.2d 572 (9th Cir. 1977).

The decisions within individual circuits even conflict with each other on the weight to be given Board interpretations of the Regulation. *Compare St. Germain v. Bank of Hawaii,* 573 F.2d 572 (9th Cir. 1977) (rejecting an Official Staff Interpretation of Section 226.8(b)(7) of the Regulation), *with Bone v. Hibernia Bank,* 493 F.2d 135 (9th Cir. 1974) (affording controlling weight to an Official Board Interpretation of the same Section of the Regulation).

What emerges from the conflict in the circuits concerning Board interpretations is the lack of a clear standard of judicial review applicable to such interpretations. The resulting confusion has had two unsettling effects. First, it has left creditors with no degree of assurance that they can safely rely on what the Board says they must disclose. Second, it has prompted an unprecedented explosion of litigation in the federal courts[18] which has further aggravated the conflict.

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[18]Since 1972, over 11,000 Truth in Lending cases have been brought in the federal courts alone. *See* Brief for Amici Curiae, National Consumer Finance Association, Consumer Bankers Association and General Motors Acceptance Corporation, in Support of Petition for a Writ of Certiorari, at 5, *Ford Motor Credit Company, et al. v. Milhollin, et al.,* No. 78-1487 (April 19, 1979). The following statement was recently made by Senator Garn in support of proposed legislation to simplify the Act:

> "One of the most shocking aspects of the Truth in Lending Act is the ever-growing burden being placed upon the Federal court system by the multiplicity of suits based on nonwillful technical violations of the act. We received shocking evidence in March of 1976 before the Senate Consumer Affairs Subcommittee establishing that litigation based on the punitive damage provision of the Truth in Lending Act is seriously encumbering the work of the Federal courts in certain sections of the country." 123 Cong. Rec. S7487 (daily ed. May 12, 1977).

In order to restore the harmony that Congress intended, this Court should resolve the conflict in the circuits and hold that Board interpretations of the Act and the Regulation are entitled to great deference and should be followed unless they are plainly erroneous.

III

THE COURTS SHOULD NOT DEFEAT THE PURPOSES OF THE ACT BY IMPOSING DISCLOSURE REQUIREMENTS NOT EXPRESSLY REQUIRED BY THE REGULATION

The considerations discussed above strongly suggest that, without regard to whether the Board has interpreted the Act or the Regulation, the courts should not defeat the purposes of the Act by imposing disclosure obligations upon creditors that are not expressly required by the Regulation.

Although the purposes of the Act are stated in broad terms in Section 102, the Act and the Regulation are very specific about what disclosures are required to carry out these purposes. The Regulation thus requires that specific credit cost disclosures be given, most of which relate to numerical amounts. 12 C.F.R. §§ 226.8(b), 226.8(c), 226.8(d) (1978). To insure that these disclosures will be provided to the consumer in a meaningful and understandable fashion, the Regulation requires that they be made clearly, conspicuously and in meaningful sequence, 12 C.F.R. § 226.6(a) (1978), and on the same side of a single page, 12 C.F.R. § 226.8(a) (1978). The creditor may not disclose additional information if such additional information would mislead or confuse the consumer or contradict, obscure or detract attention from the information required to be disclosed by the Regulation.

12 C.F.R. § 226.6(c) (1978). Congress and the Board were justifiably concerned that overdisclosure of credit information would confuse and mislead credit shoppers and would destroy the desired uniformity in credit disclosures.

This desire for simplicity and uniformity in credit cost disclosures has been seriously undermined by the approach used by many courts that have imposed disclosure obligations upon creditors that are not expressly required by the Regulation. In furthering their own notions of what should be disclosed, these courts have either added new disclosure requirements found nowhere in the Act or the Regulation, *e.g.*, *Woods v. Beneficial Finance Co.*, 395 F. Supp. 9, 16 (D. Ore. 1975) (holding that an acceleration clause should be disclosed "under the spirit of the Act" because it is "an obvious concern" to the customer) or have adopted strained and illogical interpretations of the specific disclosure requirements of the Regulation to reach the same result, *e.g.*, *Garza v. Chicago Health Clubs, Inc.*, 347 F. Supp. 955 (N.D. Ill. 1972) (holding that the word "charge" in Section 226.8(b)(4) includes the creditor's right of acceleration).

This shift in approach from the straightforward disclosure of simple and precise credit costs to a requirement that all relevant credit terms be disclosed has forced creditors to employ lengthy and unwieldy disclosure statements to protect against expansive interpretations of the disclosure requirements of the Regulation. These lengthy disclosure statements are likely to be both nonuniform and confusing to consumers, thus defeating the purpose of the Act. *See* Landers, *Some Reflections On Truth In Lending*, 1977 U. Ill. L.F. 669, 674-76; *Kessler v. Associates Financial Services Co.*, 573 F.2d 577, 578 (9th Cir. 1977); *Mirabal v. General Motors Acceptance Corp.*, 537 F.2d 871, 888 (7th Cir. 1976) (Moore, J., dissenting).[19]

In order to return to the simple and uniform disclosure format intended by the Congress and the Board, creditors should only be obligated to disclose the credit information expressly required by the Regulation. In *Griffith v. Superior Ford*, 577 F.2d 455 (8th Cir. 1978), the court rejected an argument that acceleration clause disclosures are required, and observed:

[19]There is growing concern in Congress that this overdisclosure of credit information is defeating the purposes of the Act. In testimony before the United States Senate concerning a bill that would have simplified the disclosure requirements of the Act, Senator Proxmire stated:

> "As the sponsor of the original Truth in Lending Act I am becoming more and more concerned that its beneficial purposes are being frustrated by unnecessarily complex disclosure requirements which consumers may ignore or fail to understand.
>
> In addition, the very complexity of the requirements may impose significant costs and other burdens on creditors despite their good faith efforts to comply with the law." 122 Cong. Rec. 23609 (1976).

This concern was repeated in a Report of the Senate Committee on Banking, Housing and Urban Affairs:

> "Despite the act's clear successes, however, there is a growing belief among consumers and creditors alike that the act could be substantially improved. There is considerable evidence, for example, that disclosure forms given consumers are too lengthy and difficult to understand. Creditors, on the other hand, have encountered increasing difficulty in keeping current with a steady stream of administrative interpretations and amendments, as well as highly technical judicial decisions. There is also evidence that many creditors have sincerely tried to comply with the act but, due to its increasing complexity and frequent changes, have nonetheless found themselves in violation and subject to litigation." S.Rep. No. 720, 95th Cong., 2d Sess. 2 (1978).

"In our judgment, no such additional disclosure requirement is either explicit or implicit in the language of the Regulation. To the extent the absence of such a disclosure requirement may be perceived by the courts as a hole in the regulatory matrix, only the Federal Reserve Board is authorized to fill the hole. It is for the Board itself, not the courts, to assess the potential impact of the exercise of the right of acceleration upon the credit customer and on the basis thereof to determine whether to explicitly expand the existing disclosure requirements. We are unwilling to usurp the prerogatives of the Board." 577 F.2d at 460.

See also Martin v. Commercial Securities Co., Inc., 539 F.2d 521, 525-26 (5th Cir. 1976); *Johnson v. McCrackin-Sturman Ford, Inc.*, 527 F.2d 257, 269 (3d Cir. 1975).

In view of the penal nature of the civil liability provisions of the Act, the courts should not impose disclosure obligations that are not clearly required by the Regulation. Section 130(a)(2) of the Act, 15 U.S.C. § 1640(a)(2) (1976), provides that, in addition to recovering actual damages for a violation of the Act, the consumer may recover twice the amount of the finance charges imposed in the transaction, with such liability not to be less than $100 nor in excess of $1,000. This civil liability is penal in nature and applies without regard to whether the violation was intentional or the debtor suffered any damages. *See Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 375-76 (1973); *Williams v. Public Finance Corp.*, 598 F.2d 349, 359 (5th Cir. 1979); *Charles v. Kraus Co.*, 572 F.2d 544, 546 (5th Cir. 1978).

This penal aspect of the Act will not justify an interpretation of the Regulation that would permit a creditor to escape its express provisions. *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 375 (1973). However, it does suggest that the courts should not adopt strained or novel interpretations of the Regulation with the result that creditors are subjected to heavy penalties for failing to make disclosures not clearly required by the express terms of the Regulation.

IV

THE DISCLOSURE STATEMENTS COMPLY WITH THE ACT AND THE REGULATION CONCERNING THE DISCLOSURE OF DEFAULT, DELINQUENCY OR SIMILAR CHARGES

Section 128(a)(9) of the Act, 15 U.S.C. § 1638 (a)(9) (1976), requires the creditor to disclose "[t]he default, delinquency, or similar charges payable in the event of late payments." Section 226.8(b)(4) of the Regulation, 12 C.F.R. § 226.8(b)(4) (1978), implements this Section of the Act by requiring the disclosure of "[t]he amount, or method of computing the amount, of any default, delinquency, or similar charges payable in the event of late payments."

The Buyers alleged in their complaints and argued in the courts below that the above provisions of the Act and the Regulation require a creditor to disclose the existence of an acceleration clause as a default, delinquency or similar charge. The Ninth Circuit has rejected this argument in *St. Germain v. Bank of Hawaii*, 573 F.2d 572 (9th Cir. 1977), holding that the phrase "default, delinquency or similar charges" refers only to specific pecuniary sums payable in the event of default. The Buyers' argument has also been

rejected by the Federal Reserve Board in an Official Staff Interpretation and by every federal court of appeals which has considered it. This unanimous rejection of the Buyers' argument is well grounded in a careful analysis of the applicable Sections of the Act and the Regulation.

A. The Default Charge Disclosure Requirements of the Act and the Regulation Apply Only to Specific Pecuniary Sums Payable With Respect to the Late Payment of Contract Installments

Since the terms "default, delinquency or similar charges" are not defined in the Act or the Regulation, established rules of statutory construction require an analysis of the commonly accepted meaning of the terms as well as the purposes and legislative history of the Act and Regulation of which they are a part. *See United States v. America Trucking Assn.*, 310 U.S. 534, 543 (1940).

1. The Plain Meaning of the Terms Used in the Act and the Regulation Establish That Only Specific Pecuniary Sums Payable in the Event of Late Payment of Contract Installments Must Be Disclosed

In construing the terms "default, delinquency or similar charges," an effort should be made to recognize and give effect to the generally accepted meaning of the terms as used by Congress and the Board. *Corning Glass Works v. Brennan*, 417 U.S. 188, 201-02 (1974); *Johnson v. McCrackin-Sturman Ford, Inc.*, 527 F.2d 257, 265-66 (3d Cir. 1975). The terms "default charge" and "delinquency charge" have acquired generally accepted meanings in the consumer credit industry. The terms are used to describe "the compensation a creditor receives on a precomputed contract for the debtor's delay in making timely instalment payments." 1 Cons. Cred. Guide (CCH) ¶ 4230. The terms do not include the creditor's right of acceleration. In fact, default and delinquency charges are imposed in lieu of acceleration:

> "Because a precomputed contract is the only one prepared on the assumption that the debtor will make all payments when due, the creditor is left without any income for a period where payment is delayed. *In lieu of accelerating the maturity* of the entire obligation, the creditor may make an appropriate charge just for the delay on the particular instalment." 1 Cons. Cred. Guide (CCH) ¶ 4231 (emphasis added). *See also* Uniform Consumer Credit Code § 2.203 and Official Comments, 1 Cons. Cred. Guide (CCH) ¶ 5063.

That Congress intended "default, delinquency and similar charges" to have this generally accepted meaning is made clear by the addition of the qualifying language "*payable* in the event *of late payments.*" It is significant that both the Act and Regulation require only the disclosure of those charges that are related to late payments made by the consumer. Congress and the Board chose not to require the disclosure of all of the consequences that may follow from the consumer's total failure to make any payment under the contract.

This commonly accepted meaning of the terms "default charge" and "delinquency charge" is employed in state retail installment sales acts that describe the specific additional charges that may be assessed against the debtor as a result of the late payment of contract

installments. The Oregon statute applicable to the contracts in these cases is typical:

> "The holder of a retail instalment contract may, if the contract so provides, collect a *delinquency charge* on each instalment in default for a period of 10 days or longer. The *delinquency charge* for any instalment shall not exceed five percent of the delinquent instalment or $5, whichever is less." O.R.S. § 83.590 (1977-1978) (emphasis added).[20]

An acceleration clause is unlike the types of charges referred to in the Oregon statute. It is not a specific sum of money. In the context of the specific wording of Section 226.8(b)(4), an acceleration clause is not an "amount" that can be disclosed; nor is it "payable" with "late payments." An acceleration clause is a contract remedy that allows the creditor, upon the debtor's default, to demand that the entire indebtedness be paid prior to its scheduled maturity date. An acceleration clause is no more a "default, delinquency or similar charge" than any other contract remedy such as the creditor's right to repossess and sell collateral or collect a deficiency judgment.

[20]The retail installment sales acts in effect in other states contain similar provisions concerning default and delinquency charges. They are cited and summarized at 1 Cons. Cred. Guide (CCH) ¶ 520. These types of default and delinquency charges were prevalent at the time the Act was passed, *see* Curran, Trends in Consumer Credit Legislation 71-72 (American Bar Foundation 1965), and were regulated by statute. *Id.* at 102-03.

2. Neither Congress nor the Federal Reserve Board Intended to Require the Disclosure of Acceleration Clauses

The right of acceleration, like many other creditor remedies upon default,[21] is an important term of a consumer credit contract. However, despite the universal use of acceleration clauses,[22] such clauses are not mentioned in the Act, the Regulation or the legislative history. The reason for this is apparent. In drafting the Act, Congress did not intend to require the disclosure of every single credit term involved in each transaction. Instead, the focus of Congress was on the disclosure of certain essential, quantifiable credit costs that would facilitate comparison shopping by consumers. This approach is reflected in both the legislative history [App. A at 2-8] and the specific provisions of the Act. Thus, with few exceptions, the disclosures required by the Act relate to credit costs that can be disclosed in numerical amounts. Act §§ 128, 129, 15 U.S.C. §§ 1638, 1639 (1976). The disclosures required by the Regulation follow the same theme. Regulation Z, 12 C.F.R. §§ 226.8(b), 226.8(c), 226.8(d) (1978). The failure of either the Act or the Regulation to require the disclosure of acceleration clauses, while explicitly defining the other disclosures that are required, is strong evidence that their disclosure was not expected.

Moreover, other provisions of the Act and the Regulation strongly suggest that Congress and the Board

[21]Most installment sale contracts provide for a variety of remedies upon the debtor's default such as the repossession and sale of collateral, the recovery of expenses of repossession and sale, and the recovery of a deficiency judgment, court costs and attorney's fees. State laws add other enforcement remedies such as replevin, attachment and execution.

[22]*See* note 12 *supra.*

intended to *exclude* a requirement for the disclosure of creditor remedies, including the right of acceleration. Section 124 of the Act, 15 U.S.C. § 1634 (1976), provides that:

> "If information disclosed in accordance with this chapter is subsequently rendered inaccurate as the result of any act, occurrence, or agreement subsequent to the delivery of the required disclosures, the inaccuracy resulting therefrom does not constitute a violation of this chapter."

This provision is repeated in the Regulation, 12 C.F.R. § 226.6(g) (1978), with the following explanatory footnote:

> "Such acts, occurrences, or agreements include the failure of the customer or lessee to perform his obligations under the contract *and such actions by the creditor or lessor as may be proper to protect his interests in such circumstances.*" 12 C.F.R. § 226.6(g) n.6 (1978) (emphasis added).

The Senate Report on Section 4(h) of the Senate Bill, which ultimately became Section 124 of the Act, makes it clear that the creditor's exercise of the remedies of acceleration, repossession and sale are considered subsequent events or occurrences even though the resultant shortening of the credit term would affect the interest rate.[23]

[23] "A repossession permitted by State law but not mutually agreed to by both parties would affect the rate. The new language [§ 124] makes it clear that such a change would not violate the act." S.Rep. No. 392, 90th Cong., 1st Sess. 18 (1967).

3. The Disclosure Statements in These Cases Disclose All Default, Delinquency or Similar Charges Payable in the Event of the Late Payment of Contract Installments

Paragraph 12 on the front side of the installment sale contracts signed by the Buyers in these cases provides for and discloses default and delinquency charges as follows:

> "(12) Delinquency Charges: Buyer hereby agrees to pay a delinquency charge on each installment in default for more than 10 days in the amount of 5% thereof or $5.00, whichever is less, plus such expenses incurred by Seller in effecting collection hereunder as may be allowed by law." [J.A. 9, 65]

Since these are the only monetary charges payable with respect to the *late payment* of contract installments, the dealers and Ford Credit have made all disclosures required by Section 128(a)(9) of the Act and Section 226.8(b)(4) of the Regulation.

B. The Federal Reserve Board Has Issued an Official Staff Interpretation Stating That No Default, Delinquency, or Similar Charge Disclosures Are Required With Respect to an Acceleration Clause if the Creditor Rebates Unearned Finance Charges Upon Payment of the Indebtedness After Acceleration in the Same Manner That It Rebates Unearned Finance Charges Upon Voluntary Prepayment

On April 4, 1977, the Board issued an Official Staff Interpretation in which it considered whether the presence of an acceleration clause in a consumer credit contract gives rise to any disclosure obligations under Section 128(a)(9) of the Act or Section 226.8(b)(4) of the Regulation. The Official Staff Interpretation

was preceded by one unofficial Staff Letter and followed by two others, all concerning the same question.[24]

1. Staff Letter No. 851

In Staff Letter 851, issued on October 22, 1974, the staff addressed itself to the question of whether an acceleration clause is a "charge" that must be disclosed under Section 226.8(b)(4) of the Regulation. In the letter, the staff stated:

> "For the purposes of the Truth in Lending disclosures, this staff views an acceleration of payments as essentially a prepayment of the contract obligation. . . .
>
> If, under the acceleration provision, a rebate is made by the creditor in accordance with the disclosure of the rebate provisions of § 226.8(b)(7), we believe that there is no *additional* 'charge' for late payments made by the customer and therefore no need to disclose under the provisions of § 226.8(b)(4). On the other hand, if upon acceleration of the unpaid remainder of the total of payments, the creditor does not rebate unearned finance charges in accordance with the rebate provisions disclosed in § 226.8(b)(7), any amounts retained beyond those which would have been rebated under the disclosed rebate provisions represent a 'charge' which should be disclosed under § 226.8(b)(4)." [App. B at 21] (emphasis in original).

The statement that the staff viewed an "acceleration of payments as essentially a prepayment of the contract obligation" could be interpreted to mean that the staff

[24]The Official Staff Interpretation and the three Staff Letters are reprinted in Appendix B to this Brief.

viewed the act of acceleration as constituting a prepayment. An alternative and more reasonable interpretation is that the staff viewed *payment* after acceleration as essentially a form of prepayment. The Official Staff Interpretation expressly adopts the latter view.

2. Official Staff Interpretation No. FC-0054

Because of continuing litigation and uncertainty over the acceleration question and the Board's position with respect thereto, on April 4, 1977 the Board issued an Official Staff Interpretation.[25] The Official Staff Interpretation began by stating that the creditor's right of acceleration upon default is not by itself a default, delinquency or similar charge:

> "It is staff's opinion that the phrase 'default, delinquency, or similar charges in the event of late payments,' found in § 128(a)(9) and § 129(a)(7) of the Truth in Lending Act and § 226.8(b)(4) of Regulation Z, refers to specific sums assessed against a borrower solely because of failure to make payments when due. It is staff's opinion that the mere right to accelerate contained in a contractual provision which sets out the creditor's right to accelerate the entire obligation upon a certain event (generally the obligor's failure to make a payment when due) is not a *charge*

[25]This Official Staff Interpretation was issued pursuant to procedures adopted by the Board implementing Section 130(f) of the Act, 15 U.S.C. § 1640(f) (1976). The procedures call for the publication of a proposed Official Staff Interpretation in the Federal Register and the solicitation of public comment with respect to the proposed Interpretation. The procedures currently in effect are found in Section 226.1(d) of the Regulation, 12 C.F.R. § 226.1(d) (1978). The procedures in effect when Official Staff Interpretation No. FC-0054 was issued varied only slightly from those currently in effect. *See* 41 Fed. Reg. 28255-56 (July 9, 1976).

payable in the event of late payment. Therefore, it need not be disclosed under § 226.8(b)(4)." [App. B at 19] (emphasis in original).

With respect to the rebate analysis in Staff Letter 851, the Official Staff Interpretation clarified Staff Letter 851 by stating that the Staff views *payment* upon acceleration as a form of prepayment:

"You refer to a prior Public Information Letter, No. 851, which discusses the right of acceleration. Staff believes that letter addresses a different issue than the one posed in your letter. *Staff understands that letter to say that early payment of the balance of a precomputed finance charge obligation by a customer upon acceleration by the creditor is essentially the same as a prepayment of the obligation.* Therefore, if the creditor does not rebate unearned finance charges in accordance with the rebate provisions disclosed under § 226.8 (b)(7) *when the customer pays the balance of the obligation upon acceleration,* any amounts retained beyond those which would have been rebated under the disclosed rebate provisions do represent the type of charge that must be disclosed under § 226.8(b)(4)." [App. B at 19] (emphasis added).

3. Staff Letters 1208 and 1324

In Staff Letter 1208 issued on July 6, 1977, the staff commented upon the disclosure requirements applicable where the disclosure statement provides for a rebate of unearned finance charges upon prepayment and the contract contains an acceleration clause but neither the rebate disclosure nor the acceleration clause refer to any rebate upon payment after acceleration:

"The fact that the contract is silent concerning rebate upon prepayment after acceleration is not determinative of the issue; the question is whether in fact the creditor does or does not rebate upon prepayment after acceleration in accordance with the rebate method shown on the disclosure statement. In this sense, then, the individual creditor's policy determines whether there is a violation of the Act and regulation." [App. B at 23].

Staff Letter 1324 issued on November 14, 1978 [App. B at 23-26] essentially repeated the analysis found in the Official Staff Interpretation No. FC-0054 and Staff Letter 1208.

4. Summary of the Board's Position

The Board's position expressed in Official Staff Interpretation No. FC-0054 and Staff Letters 851, 1208 and 1324 can be summarized as follows:

1. The right of acceleration is not itself a default, delinquency or similar charge within the meaning of Section 128(a)(9) of the Act or Section 226.8(b)(4) of the Regulation. Those sections only apply to specific pecuniary charges payable in the event of a late payment.

2. The Board views a *payment* in full of the indebtedness after acceleration as "essentially" the same as a prepayment. The Board does not view an acceleration of the indebtedness as itself a prepayment.

3. If the creditor rebates unearned finance charges upon payment in full of the indebtedness after acceleration in the same manner as it rebates such unearned finance charges in the event of a prepayment where there has been no acceleration,

no default, delinquency or similar charge has been imposed and no disclosures are required under Section 128(a)(9) of the Act or Section 226.8 (b)(4) of the Regulation.

5. Application of the Board's Interpretation to the Contracts in These Cases

Paragraph 14 on the front side of the contracts in these cases discloses the buyer's right to a rebate of unearned finance charges in the event of a prepayment of the indebtedness. [J.A. 9, 65] This provision of the contract and Oregon state law both require the holder of the contract to rebate unearned finance charges upon full payment of the contract indebtedness regardless of whether the full payment occurs before or after an acceleration of the installment due dates. Ford Credit's practice in all cases is to adhere to these requirements.

Applying the Board's interpretation, all default, delinquency or similar charge disclosures have been made with respect to the contracts in these cases.

C. Every Federal Court of Appeals Opinion in Which the Acceleration Issue Has Been Decided Has Held That No Default Charge Disclosure Is Necessary With Respect to an Acceleration Clause Where the Creditor Is Required to Rebate Unearned Finance Charges Upon Payment of the Indebtedness After Acceleration

1. The Federal Courts of Appeals Have Unanimously Held That the Right of Acceleration Is Not a Default, Delinquency or Similar Charge

Every federal appellate court that has considered the issue, including the Ninth Circuit in the decision below, has held that an acceleration clause is not a "charge" required to be disclosed under Section

128(a)(9) of the Act or Section 226.8(b)(4) of the Regulation. *Johnson v. McCrackin-Sturman Ford, Inc.*, 527 F.2d 257 (3d Cir. 1975); *Martin v. Commercial Securities Co., Inc.*, 539 F.2d 521 (5th Cir. 1976), *as modified prospectively in McDaniel v. Fulton National Bank*, 571 F.2d 948 (5th Cir.) (*en banc*), *reh. denied*, 576 F.2d 1156 (5th Cir. 1978) (*en banc); Croysdale v. Franklin Savings Assn.*, App. No. 78-1364 (7th Cir., filed July 12, 1979); *Griffith v. Superior Ford*, 577 F.2d 455 (8th Cir. 1978); *St. Germain v. Bank of Hawaii*, 573 F.2d 572 (9th Cir. 1977); *Milhollin v. Ford Motor Credit Co.*, 588 F.2d 753 (9th Cir. 1978) (following *St. Germain*); *Begay v. Ziems Motor Co.*, 550 F.2d 1244 (10th Cir. 1977); *Price v. Franklin Investment Co., Inc.*, 574 F.2d 594 (D.C. Cir. 1978).

2. The Federal Courts of Appeals Have Unanimously Held That Default Charge Disclosures Need Not Be Made With Respect to an Acceleration Clause if the Creditor Is Required to Rebate Unearned Finance Charges Upon Prepayment After Acceleration

The federal appellate courts are also unanimous in holding that no default charge disclosures with respect to an acceleration clause are required under Section 226.8(b)(4) where the creditor is required to rebate unearned finance charges upon payment of the indebtedness after acceleration.

Johnson v. McCrackin-Sturman Ford, Inc., 527 F.2d 257 (3d Cir. 1975), was the first federal appellate court decision to consider the acceleration question. In *Johnson*, the acceleration clause in the contract did not expressly provide for a rebate of unearned finance charges upon payment of the indebtedness al-

though a state statute required the rebate of unearned finance charges upon "liquidation" of the indebtedness prior to maturity. 527 F.2d at 265 n.13. The Third Circuit held that no default charge disclosure with respect to an acceleration clause is required under Section 226.8(b)(4) where the creditor rebates unearned finance charges in accordance with the state statute. The *Johnson* decision was followed by the District of Columbia Circuit in *Price v. Franklin Investment Co., Inc.*, 574 F.2d 594 (D.C. Cir. 1978).

The Fifth Circuit's position was first articulated in *Martin v. Commercial Securities Co., Inc.*, 539 F.2d 521 (5th Cir. 1976). In *Martin*, the court held that acceleration disclosures are not required regardless of the creditor's rebate practice. This "never disclose" rule of the Fifth Circuit was later adopted by the Tenth Circuit in *Begay v. Ziems Motor Co.*, 550 F.2d 1244 (10th Cir. 1977). *See also United States v. One 1976 Chevrolet Station Wagon*, 585 F.2d 978 (10th Cir. 1978).

In *McDaniel v. Fulton National Bank*, 571 F.2d 948 (5th Cir. 1978), the Fifth Circuit, sitting *en banc*, reconsidered its decision in *Martin* in light of the subsequently issued Official Staff Interpretation No. FC-0054. The court approved the *Martin* holding that the right of acceleration need not be disclosed under Section 226.8(b)(4). 571 F.2d at 950. However, the court prospectively overruled the holding in *Martin* that default charge disclosures are never required with respect to an acceleration clause regardless of the creditor's rebate practice. The court adopted the Official Staff Interpretation "as the rule of decision in these cases" effective 90 days from the date of the decision. 571 F.2d at 951. In an opinion denying a petition for

rehearing, the court in *McDaniel* clarified its opinion by observing that default charge disclosures will be required in the Fifth Circuit if the creditor has the contract right to collect unearned finance charges upon payment of the indebtedness after acceleration regardless of whether that contract right is actually enforced by the creditor. Without citing Staff Letter 1208, the court appears to have rejected it. *McDaniel v. Fulton National Bank*, 576 F.2d 1156, 1157 (5th Cir. 1978) (opinion on denial of rehearing *en banc*).

In *Griffith v. Superior Ford*, 577 F.2d 455 (8th Cir. 1978), the Eighth Circuit held that acceleration disclosures are not required under Section 226.8(b)(4). Although the court seems to have adopted the "never disclose" rule of the *Martin* case, 577 F.2d at 460, it observed that its holding was consistent with both the Board's Official Staff Interpretation No. FC-0054 and the decision of the Third Circuit in *Johnson* since the creditor's policy and the state statute required a rebate of unearned finance charges upon payment of the indebtedness after acceleration. *Id.*

The Ninth Circuit in *St. Germain v. Bank of Hawaii*, 573 F.2d 572, 575, 577 (9th Cir. 1977), rejected the Board's Official Staff Interpretation and held that acceleration disclosures are never required under Section 226.8(b)(4) regardless of the creditor's rebate policy or state law. *Accord, Milhollin v. Ford Motor Credit Company*, 588 F.2d 753, 757-58 (9th Cir. 1978) (following *St. Germain*); *Kessler v. Associates Financial Services Co.*, 573 F.2d 577 (9th Cir. 1977) (following *St. Germain*). The Seventh Circuit appears to have adopted the Ninth Circuit's position. *Croysdale v. Franklin Savings Assn.*, App. No. 78-1364 (7th Cir., filed July 12, 1979).

Although the foregoing decisions do not reflect total consistency or uniformity with each other or with the Board, they all share one common theme: if a creditor is required to rebate unearned finance charges upon payment of the indebtedness after acceleration, no disclosures are required with respect to an acceleration clause under Section 226.8(b)(4) of the Regulation.

V

THE DISCLOSURE STATEMENTS MAKE ALL PREPAYMENT DISCLOSURES REQUIRED BY THE REGULATION

A. Section 226.8(b)(7) of the Regulation Requires the Disclosure of the Creditor's Method of Rebating Unearned Finance Charges Upon Payment in Full of the Indebtedness Prior to Its Maturity Date

1. Introductory Statement

In a precomputed contract, if the debtor prepays the full contract balance, including precomputed finance charges, prior to the scheduled maturity date, the creditor receives a premium in the form of "unearned" finance charges. For this reason, most retail installment sales acts require the creditor to rebate to the debtor any unearned finance charges resulting from the debtor's prepayment of the balance due on a precomputed contract. The Oregon statute in effect when the contracts in these cases were signed is typical:

> "Notwithstanding the provisions of a retail instalment contract to the contrary, the buyer may pay in full at any time before maturity the obligation contained in the retail instalment contract. Upon such premature payment, the buyer shall received a refund credit." O.R.S. § 83.620 (1975-1976).[26]

The Truth in Lending Act does not require any disclosures with respect to the rebate of unearned finance charges upon prepayment of a precomputed contract. However, Section 226.8(b)(7) of the Regulation provides:

> "(b) In any transaction subject to this section, the following items, as applicable, shall be disclosed:
>
> . . . .
>
> (7) Identification of the method of computing any unearned portion of the finance charge in the event of prepayment in full of an obligation which includes precomputed finance charges and a statement of the amount or method of computation of any charge that may be deducted from the amount of any rebate of such unearned finance charge that will be credited to the obligation or refunded to the customer. If the credit contract does not provide for any rebate of unearned finance charges upon prepayment in full, this fact shall be disclosed."

2. The Term "Prepayment" as Used in Section 226.8(b)(7) Refers to a Payment in Full of the Indebtedness Prior to Its Maturity Date

The plain meaning of the term "prepayment" as used in Section 226.8(b)(7) of the Regulation is a payment in full of the indebtedness prior to its originally scheduled maturity date. This is clear from the fact

[26]The state laws providing for the rebate of unearned finance charges upon prepayment are reproduced at 2-4 Cons. Cred. Guide (CCH) at ¶ 4460.

that, until such a payment has been made, there are no unearned finance charges for the creditor to rebate. As long as the debtor has the continued use of the credit that was extended to him, the creditor continues to "earn" all precomputed finance charges.

The legislative history of Section 226.8(b)(7) confirms this obvious fact. [App. A at 8-10] The original Senate Bill required the disclosure of "the terms applicable in the event of advanced . . . payments" [App. A at 8]; and the Senate Report accompanying the final version of the Senate Bill referred to the rebate of unearned finance charges "if the debt is paid early." [App. A at 8] The Conference Report likewise referred to the disclosure of prepayment penalties "at the time of completion of a consumer credit transaction" and the rebate policy applicable in case of prepayment of an installment contract "in terms of amount and time." [App. A at 9] Although the Act does not require prepayment disclosures, the foregoing legislative history shows that the term "prepayment" has a well established meaning in the consumer credit industry and denotes a full payment of the contract balance.

Section 226.8(b)(7) in plain and simple terms requires the creditor to disclose its method of computing the rebate of unearned finance charges in the event that a precomputed contract is paid in full prior to the scheduled maturity date.

3. The Contracts in These Cases Fully and Accurately Disclose the Creditor's Method of Rebate of Unearned Finance Charges

Paragraph 14 on the front side of the contracts in these cases contains the following disclosure of the Buyers' right to a rebate of unearned finance charges in the event of a prepayment of the obligation:

> "(14) Prepayment Rebate: Buyer may prepay his obligations under this contract in full at any time prior to maturity of the final instalment hereunder, and, if he does so, shall receive a rebate of the unearned portion of the Finance Charge computed under the sum of the digits method after first deducting an acquisition fee of $15.00. No rebate will be made if the amount is less than $1.00." [J.A. 9, 65]

This disclosure complies in all respects with Section 226.8(b)(7) of the Regulation.

B. The Federal Reserve Board Has Issued an Official Staff Interpretation Stating That the Creditor's Method of Rebating Unearned Finance Charges Upon Prepayment of the Indebtedness After Acceleration Need Not Be Separately Disclosed Where It Is the Same as the Disclosed Method of Rebate Applicable to Voluntary Prepayment

In its Staff Letter No. 851 and Official Staff Interpretation No. FC-0054, the Board interpreted Section 226.8(b)(7) of its own Regulation and discussed whether any special prepayment disclosures are required because of the presence of an acceleration clause in a precomputed contract. The Board concluded that no such special disclosures are required.

1. Staff Letter 851

The relevant portion of Staff Letter 851 states that:

> "For the purposes of Truth in Lending disclosures, this staff views an acceleration of payments as essentially a prepayment of the contract obligation. As such, the disclosure provisions of § 226.8(b)(7) of the Regulation, which require

the creditor to identify the method of rebating any unearned portion of the finance charge or to disclose that no rebate would be made, apply. If the creditor rebates under one method for acceleration and another for voluntary prepayment, both methods would need to be identified under § 226.8(b)(7). Failure to disclose the method of rebate or nonrebate would be a violation of the Truth in Lending Act." [App. B at 21]

As pointed out earlier in the context of Section 226.8(b)(4),[27] this letter created some confusion as to what the staff meant by stating that it viewed "acceleration of payments as essentially a prepayment of the contract obligation." One possible interpretation of this letter might suggest that it was the staff's position that, when a creditor accelerates the unpaid installments of a precomputed contract, the contract at that point is deemed to be "prepaid." This interpretation would turn a creditor's demand for payment of unpaid installments into a payment of the installments even though the creditor might never receive another payment on the contract. However, an acceleration of installment payments is not a payment of the unpaid installments but is the first step taken by the creditor in an attempt to secure payment of the installments. Acceleration occurs because the creditor has not been paid and is both the legal and logical antithesis of prepayment.[28]

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[27]*See* pages 40-41 *supra*.

[28]*Martin v. Commercial Securities Co., Inc.*, 539 F.2d 521, 529 (5th Cir. 1976) ("In the installment credit context prepayment and acceleration appear to be conceptually antithetical. The former is the unilateral act of the debtor; the latter the unilateral act of the creditor in the typical installment contract."); *Perry v. Liberty Consumer Discount Co.*, 433 F. Supp. 1352, 1359 (E.D. Pa. 1977), *aff'd mem.*, 577 F.2d 728 (3d Cir. 1978) ("As I view it, acceleration is but the first step by the lender in *attempting* to obtain prepayment from the borrower; in no sense can acceleration and prepayment be equated." (emphasis in original)).

The proper interpretation of Staff Letter 851 is that the staff was stating that it viewed *payment* after acceleration as essentially a form of prepayment. The Official Staff Interpretation expressly adopted this view.

2. Official Staff Interpretation No. FC-0054

In order to remove any confusion caused by Staff Letter 851, the Board issued an Official Staff Interpretation in which it stated emphatically that it views a *payment* of the indebtedness after acceleration as a prepayment:

> "You refer to a prior Public Information Letter, No. 851, which discusses the right of acceleration. Staff believes that letter addresses a different issue than the one posed in your letter. *Staff understands that letter to say that early payment of the balance of a precomputed finance charge obligation by a customer upon acceleration by the creditor is essentially the same as a prepayment of the obligation.* Therefore, if the creditor does not rebate unearned finance charges in accordance with the rebate provisions disclosed under § 226.8(b)(7) *when the customer pays the balance of the obligation upon acceleration,* any amounts retained beyond those which would have been rebated under the disclosed rebate provisions do represent the type of charge that must be disclosed under § 226.8 (b)(4)." [App. B at 19] (emphasis added).

This Official Staff Interpretation was followed by two additional Staff Letters (nos. 1208 and 1324) repeating

the Board's analysis that a payment of the indebtedness after acceleration is treated as a prepayment for purposes of Section 226.8(b)(7). [App. B at 22-26]

3. Summary of the Board's Position

The Board's position on Section 226.8(b)(7) can thus be summarized as follows:

1. The Board views a *payment* in full of the indebtedness after acceleration as "essentially" the same as a prepayment. The Board does not view an acceleration of the indebtedness as itself a prepayment.

2. Under Section 226.8(b)(7) of the Regulation, the creditor must disclose its method of rebating unearned finance charges upon prepayment of the indebtedness. If the creditor's rebate practice applicable to a prepayment of the indebtedness following acceleration is different from that applicable to voluntary prepayment, both methods of rebate must be disclosed under Section 226.8(b)(7). However, if the creditor rebates unearned finance charges upon prepayment of the indebtedness after acceleration in the same manner that it rebates unearned finance charges upon voluntary prepayment of the indebtedness where there has been no acceleration, a single disclosure of the rebate method is all that is required. The disclosure need not single out the rebate policy applicable to prepayment after acceleration.

4. The Board's Interpretation of Its Own Regulation Is Plainly Correct and Should Be Followed

The Board's interpretation with respect to prepayment disclosures is plainly correct. The interpretation is consistent with the well-established meaning of the

term prepayment which denotes full payment of the contract balance prior to the originally scheduled maturity date. It is also consistent with the purpose of Section 226.8(b)(7) which is to require the disclosure of the creditor's method of rebating unearned finance charges upon early payment of a precomputed contract. It would be pointless and confusing to require disclosure of whether the creditor rebates unearned finance charges upon acceleration of the contract. This is because there are no unearned finance charges that accrue to the creditor upon acceleration of the contract. It is only when the debtor makes *payment* of the contract balance *after* acceleration and prior to the originally scheduled maturity date that the creditor could receive unearned finance charges. Until that payment is made, all precomputed finance charges continue to be earned by the creditor.

The special rule of deference applicable to the Board's interpretation of its own Regulation has been discussed in part II of the Brief. This rule was particularly well stated by the Ninth Circuit in *Bone v. Hibernia Bank*, 493 F.2d 135, 139 (9th Cir. 1974) which involved an Official Board Interpretation of Section 226.8(b)(7) of the Regulation:

> "Our concern here is not with the construction of a statute, but rather with the construction of an administrative regulation issued pursuant to statutory directive. When interpreting an administrative regulation whose meaning is in doubt, we must necessarily look to the construction given the regulation by the agency responsible for its promulgation. *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 65 S. Ct. 1215, 89 L. Ed. 1700 (1945).

. . . Great deference is especially due the Federal Reserve Board's construction of its own Regulation Z because of the important interpretive and enforcement powers granted this agency by Congress under the Truth in Lending Act."

5. The Disclosure Statements in These Cases Comply With the Board's Interpretation

The disclosure statements employed in these cases disclose fully the creditor's method of rebating unearned finance charges upon prepayment in full of the indebtedness. [J.A. 9, 65] This prepayment disclosure applies to any prepayment of the indebtedness whether it occurs before or after an acceleration. And, in accordance with the disclosure and Oregon state law, Ford Credit rebates unearned finance charges upon prepayment of the indebtedness after acceleration in the same manner that it rebates unearned finance charges upon prepayment of the indebtedness where there has been no acceleration. The disclosure statements in these cases thus comply with Section 226.8 (b)(7) as interpreted by the Board.

C. The Decision of the Lower Court Equating Prepayment With Acceleration Should Be Reversed

The court below held that Ford Credit violated the Act and Regulation Z in the following respect:

> "We hold on the basis of *St. Germaine* [*sic*] that Ford Credit is liable to the Milhollins for failure to disclose the acceleration clause and its effect on unearned interest on the face of the contract." *Milhollin v. Ford Motor Credit Co.*, 588 F.2d 753, 758 (9th Cir. 1978). [J.A. 51]

The court did not independently analyze the issue but instead relied completely upon the Ninth Circuit's opinion in *St. Germain v. Bank of Hawaii*, 573 F.2d 572 (9th Cir. 1977).

In *St. Germain*, the plaintiff alleged that the creditor violated the Act and the Regulation by failing to disclose its right to accelerate the indebtedness as a default charge pursuant to Section 226.8(b)(4). The court held that default charge disclosures are never required with respect to an acceleration clause under Section 226.8(b)(4) and rejected the Board's Official Staff Interpretation No. FC-0054. 573 F.2d at 575-77. This rejection was based in part upon the court's mistaken view that the Board's position has been expressed "only through unofficial staff statements rather than official interpretations," 573 F.2d at 576, and in part upon the court's belief that application of the Board's Official Staff Interpretation would result in "the disclosure of rebate confusion" because of the lack of uniformity in state laws concerning finance charge rebates. 573 F. 2d at 575.

Having rejected the Board's Official Staff Interpretation of Section 226.8(b)(4), the court addressed the issue of whether prepayment disclosures are required under Section 226.8(b)(7).[29] The court's holding in this respect is unclear. At the beginning of the opinion the court stated:

> "We reverse, holding that TILA compels a creditor making a consumer loan to disclose the creditor's

[29] As in this case, the plaintiff in *St. Germain* had not alleged or argued any violation of Section 226.8(b)(7). This issue was injected into the case by the court on its own and after oral argument.

right to accelerate full payment of the debt upon the debtor's default or late payment." 573 F.2d at 573.

Despite this sweeping language, it is unlikely that the court really intended to hold that the Regulation requires disclosure of the "right to accelerate" because such a holding would necessarily be premised upon the theory that the right to accelerate constitutes a "charge" under Section 226.8(b)(4); and this theory was specifically rejected by the court. 573 F.2d at 576.

At the conclusion of the opinion, the court made it clear that its holding was instead based upon the prepayment disclosure requirements of Section 226.8(b)(7). The court cited Staff Letter 851 and the Board's Official Staff Interpretation No. FC-0054 and described the Board's theory that a payment after acceleration is considered a prepayment for purposes of Section 226.8(b)(7). 573 F.2d at 576. Although the court stated that it was adopting the Board's prepayment theory, it badly misread the Board's position in this regard and held that prepayment and acceleration are equivalents:

> "When we choose the Board's alternative prepayment theory, we cut a clean path through the thicket. Regulation Z, Section 226.8(b)(7), requires '[i]dentification of the method of computing any unearned portion of the finance charge in the event of prepayment in full. . . . If the credit contract does not provide for any rebate of unearned finance charges upon prepayment in full, this fact should be disclosed.' When we equate acceleration with prepayment, the disclosure obligation under Section 226.8(b)(7) is evident: The creditor must disclose whether a rebate of unearned interest will be made upon acceleration and also disclose the method by which the amount of unearned interest will be computed if the debt is accelerated." 573 F.2d at 577.

As discussed above, the Board's Official Staff Interpretation clearly and emphatically rejects any notion that prepayment and acceleration are the same. The Official Staff Interpretation, in discussing Staff Letter 851, explains that:

> "Staff understands that letter to say that early *payment* of the balance of a precomputed finance charge obligation by a customer upon acceleration by the creditor is essentially the same as a prepayment of the obligation." [App. B at 19] (emphasis in original).

The Ninth Circuit in *St. Germain* either overlooked this crucial fact or once again chose to disregard the Official Staff Interpretation, this time in the context of Section 226.8(b)(7).[80]

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[80]Even assuming, for purposes of discussion, the correctness of the court's holding that prepayment and acceleration are the same, the *St. Germain* decision is erroneous. The court in *St. Germain* stated that it could "perceive no serious textual impediment to reading Section 226.8(b)(7) prepayment to include involuntary prepayment (acceleration) as well as voluntary prepayment." 573 F.2d at 576. The disclosure form employed by the bank in *St. Germain* described the bank's rebate policy upon "prepayment." *Id.* at 573. If prepayment and acceleration are the same, the bank's form complied with section 226.8(b)(7) as interpreted by the court since it described the bank's rebate policy upon prepayment. *See Griffith v. Superior Ford*, 577 F.2d 455, 459 (8th Cir. 1978) criticizing *St. Germain* for this reason. *See also Johnson v. McCrackin-Sturman Ford, Inc.*, 527 F.2d 257, 269 n.28 (3d Cir. 1975).

The decision in *St. Germain* represented a startling and radical departure from prior law on the subject of acceleration disclosures. It conflicted with the Board's Official Staff Interpretation of both Sections 226.8(b)(4) and 226.8(b)(7) and with the decisions of every other circuit court on the subject. The decision also conflicted with well established law in the Ninth Circuit requiring the courts to accord special deference to the views of the Board and its staff. *E.g.*, *Bone v. Hibernia Bank*, 493 F.2d 135, 140 (9th Cir. 1974).

By equating acceleration with prepayment, a logical and legal impossibility,[31] the court's unprecedented decision took the consumer credit industry completely by surprise and threw into instant violation of the Act literally millions of consumer credit contracts drafted in careful compliance with the Board's interpretive guidelines.

The *St. Germain* decision is illustrative of the problems facing creditors attempting in good faith to draft uniform disclosure statements that will both comply with the highly technical requirements of the Act and the Regulation and be meaningful to consumers. The same Ford Credit form that the court found insufficient in these cases was found to be sufficient by the Third Circuit in *Johnson v. McCrackin-Sturman Ford, Inc.*, 527 F.2d 257 (3rd Cir. 1975) and by the Eighth Circuit in *Griffith v. Superior Ford*, 577 F.2d 455 (8th Cir. 1978). The Federal Reserve Board, through an Official Staff Interpretation, has offered reasonable and logical disclosure guidelines applicable to both Sections 226.8(b)(4) and 226.8(b)(7) of its Regulation. These disclosure guidelines fulfill

[31]*See* page 52 and note 28 *supra*.

an explicit Congressional directive to the Board, 15 U.S.C. § 1640(f) (1976), and offer some modest hope for national uniformity amidst growing chaos in the federal courts.

This Court should reject the holding of the court in *St. Germain* and direct the lower federal courts to follow the clear disclosure guidelines set forth in the Board's Official Staff Interpretation.

Conclusion

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed.

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APPENDIX A

LEGISLATIVE HISTORY OF THE TRUTH IN LENDING ACT

1. In General

The Truth in Lending Act was the product of a merger between two separate bills, one introduced in the Senate and the other in the House of Representatives. The original Senate Bill, S. 5, 90th Cong., 1st Sess. (1967) (herein "Senate Bill"), was introduced in the United States Senate on January 11, 1967. 113 Cong. Rec. 210-12 (1967). The Senate Bill was passed in the Senate on July 11, 1967, 113 Cong. Rec. 18424 (1967), and was sent to the House of Representatives for approval. The Senate Bill was accompanied by a Report of the Committee on Banking and Currency dated June 29, 1967, S. Rep. No. 392, 90th Cong., 1st Sess. (1967) (herein "Senate Report").

A bill was thereafter introduced in the House of Representatives, H.R. 11601, 90th Cong., 1st Sess. (1967) (herein "House Bill"), principally sponsored by Congresswoman Sullivan, which differed from the Senate Bill primarily in the area of disclosures in connection with mortgage transactions and open end credit. *See* 114 Cong. Rec. 1852-57, 10963-64 (1968). The House Bill passed in the House of Representatives on February 1, 1968. 114 Cong. Rec. 1852 (1968). The House Bill was accompanied by a Report of the Committee on Banking and Currency dated December 13, 1967, H.R. Rep. No. 1040, 90th Cong., 1st Sess. (1967) (herein "House Report").

The Senate called for a Conference Committee to study the major conflicts in the two Bills, particularly

in the area of exempted transactions. *See* 114 Cong. Rec. 14487 (1968). After six meetings, the Conference Committee resolved the differences between the House Bill and the Senate Bill and reached an agreement on May 14, 1968. 114 Cong. Rec. 14487 (1968). On May 20, 1968, Congressman Wright Patman submitted the formal Conference Report to accompany the Senate Bill. H.R. Conf. Rep. No. 1397, 90th Cong., 2d Sess. (1968) (herein "Conference Report").

On May 22, 1968, the Senate Bill was passed in lieu of the House Bill after adopting for its language much of the text of the House Bill. The Act was signed into law on May 29, 1968, to become effective on July 1, 1969. Pub. L. No. 90-321, § 504(b), 82 Stat. 146.

2. Legislative History Concerning the Credit Cost Disclosure Aspect of the Act

The original Senate Bill was strictly limited to the disclosure of the costs of credit in numerical terms. *See Truth in Lending—1967: Hearings on S. 5 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency,* 90th Cong., 1st Sess. 4-14 (1967). In the Senate Report, Senator Proxmire stated the purpose of the Act as follows:

> "The basic purpose of the truth in lending bill is to provide a full disclosure of *credit charges* to the American consumer. The bill does not in any way regulate the credit industry nor does it prescribe ceilings on credit charges. Instead, it requires that a full disclosure of *credit charges* be made so that the consumer can decide for himself whether the charge is reasonable.

> By providing full and comparable disclosure of information, the bill will permit consumers to compare the *cost of credit* among different creditors and to shop effectively for the best credit buy. The committee also believes the bill will promote the wiser use of consumer credit by consumers when they know the full *cost of credit*." Senate Report at 1 (emphasis added).

In that same Report, Senator Proxmire defined the term "cost of credit" exclusively in terms of numerical figures—dollars and cents and percentages:

> "In this way, the honest merchant is not penalized if he states the full *cost of his credit in dollars* and adds an annual percentage rate.
>
> . . . .
>
> . . . Clearly, the only solution is to require by legislation that all creditors use the same method in computing and quoting finance charges including the statement of an annual percentage rate.
>
> . . . .
>
> All installment creditors would be required to *disclose the total cost of the credit in terms of dollars and cents* and in terms of an annual percentage rate. In addition, all other charges incident to the transaction will be required to be set forth such as taxes, official fees, or insurance." Senate Report at 2, 3, 7 (emphasis added).

This conception of the cost of credit and the purpose of the Act is supported by the discussion relating to the Act in the Senate. *See* 113 Cong. Rec. 18399-424 (1967). For example, Senator Williams of Delaware emphasized that the basic purpose of the bill was to advise the debtor of a specific figure—the rate of interest he will have to pay:

"The basic purpose of the bill, as we all understand it, is to insure to the borrower that he will be told the truth by the lender as to the rate of interest he will have to pay over the term of the borrowing. That is the basic objective in the bill, as we all admit." 113 Cong. Rec. 18415 (1967).

Senator Dodd urged that the bill be passed because it required the disclosure of figures:

"Surely they have a right to know in reasonably clear and simple language and figures, exactly *how much in the way of interest and service charges* they pay on any loan or charge agreement.

Exactly how interest is computed, what it is as an actual percentage or as a *statement in terms of dollars and cents,* what the service charges are—all this information vital to the consumer, should be easily available to him so that he may make a rational decision." 113 Cong. Rec. 18418 (1967) (emphasis added).

Senator Brewster explained that this kind of disclosure would permit consumers to shop for credit:

"Consumers need a basis for comparing credit arrangements, and such comparisons can be made when *charges are stated in terms of annual percentage rate, a figure which includes all credit costs*—examination fees, insurance charges, and any other fees." 113 Cong. Rec. 18418 (1967) (emphasis added).

Finally, Senator Yarborough urged that the bill would permit consumer decisions to be based upon simple figures:

"Under the provisions of the truth-in-lending bill, instead of being faced with the combination of monthly interest rates on the total principal graduated rates of various parts of the loan, add-on rates, and unexpected service charges, the consumers in most credit dealings would be given a percent-per-year figure computed in the approved actuarial method. Using these simple figures, the consumer could then compare the interest rates of various companies and rationally chose [*sic*] the one with which he would do business." 113 Cong. Rec. 18419 (1967).

The House Bill, like the Senate Bill, was entirely cost oriented. The House Report stated its purpose as follows:

"As set forth in its three substantive titles, the Consumer Credit Protection Act has three fundamental purposes: Title I is intended to provide the American consumer with truth-in-lending and truth-in-credit advertising by providing full disclosure of the *terms and conditions of finance charges* both in credit transactions and in offers to extend credit. . . .

Title I, the truth in lending and credit advertising title, neither regulates the credit industry, nor does it impose ceilings on credit charges. *It provides for full disclosure of credit charges, rather than regulation of the terms and conditions under which credit may be extended.* It is the view of your committee that such full disclosure would aid the consumer in deciding for himself the reasonableness of the credit charges imposed and further permit the consumer to 'comparison shop' for credit. It is your committee's view that full

disclosure of the terms and conditions of credit charges will encourage a wiser and more judicious use of consumer credit." House Report at 6-7 (emphasis added).

3. Legislative History Concerning Default, Delinquency or Similar Charges

There is very little legislative history concerning Section 128(a)(9) of the Act, 15 U.S.C. § 1638(a)(9), requiring the disclosure of "default, delinquency or similar charges payable in the event of late payments."

The final drafts of both the Senate Bill and the House Bill required the disclosure of default, delinquency or similar charges. Although the House Report did not specifically discuss the meaning of these terms, the Report deals with other types of "charges" and equates them with fees or numeric costs. For example, in discussing the sums of money that must be included in the computation of the amount of the finance charge, the House Report discusses "charges" as follows:

> "Other creditors add a number of additional fees or charges to the basic finance charge, such as credit investigation fees, credit life insurance, and various 'service' charges. This permits a creditor to quote a low rate while actually earning a higher yield through the additional fees and charges." House Report at 13.

The House Report also states that the Act would require that "all additional mandatory charges imposed by the creditor as an incident to credit be included in the computation of the applicable percentage rate. . . ." *Id.* at 13. And, in discussing the monetary amounts that need not be included in the determination

of the dollar amount of the finance charge, the Report states:

> "Section 203(b) requires disclosure of the cash price, the downpayment (including any trade-in), the difference between the two, *and all other charges that are included in the credit but are not part of the finance charge*. . . . The number, amount, and due dates of the payments must also be disclosed, as well as any penalties for late payments." *Id.* at 25 (emphasis added).

The first draft of the Senate Bill did not mention "default, delinquency or similar charges." Senator Proxmire's original bill called for the disclosure of:

> "(8) the time and amount of payments scheduled to repay the indebtedness; and
>
> (9) the terms applicable in the event of advanced or delayed payments from those specified in (8) above." 113 Cong. Rec. 14691 (1967).

When Senator Proxmire introduced the Senate Bill, the commentary on the above-quoted section stated it was intended to require the disclosure of:

> "the time and amount of payments scheduled to repay the indebtedness and the terms (*penalties*) applicable in event of payments advanced or delayed from those specified in the contract. (Disclosures of the time and amount of payments, and of the *penalties* for early or late payment, were not explicitly covered by earlier bills.)" 113 Cong. Rec. at 2049 (1967) (emphasis added).

The use of the term "penalties" in this commentary indicates an intention to require the disclosure of monetary sums payable in the event of delayed payments. This is confirmed by the change made in the final

version of the Senate Bill which dropped the required disclosure of the "terms applicable" to delayed payments and required instead the disclosure of "default, delinquency or similar charges payable in the event of late payments."

4. Legislative History With Respect to Prepayment.

The Truth in Lending Act does not require any disclosures with respect to the prepayment of a credit contract. There is, however, legislative history to indicate that Congress gave to the term "prepayment" its commercially accepted meaning as a payment of the indebtedness prior to the originally scheduled maturity date.

As noted in part 3 of this Appendix, an early version of the Senate Bill required the disclosure of "the terms applicable in the event of advanced . . . payments. . . ." 113 Cong. Rec. 14691 (1967). However, this disclosure requirement was dropped in the final version of the Senate Bill. The Senate Report commented upon this deletion:

> "Section 4(b)(9)—Disclosure of late payment penalties.—This language is similar to the original S. 5 except that the requirement to indicate the terms applicable in the event of advanced payment has been deleted. Most creditors will rebate an unearned finance charge if the debt is paid early in accordance with the 'rule of 78's.' This is a complicated formula which would require at least a three-paragraph explanation to be intelligible to the average consumer." Senate Report at 15.

The House Bill and House Report did not refer to prepayment. However, the Conference Report prepared concerning the compromise reached on the Senate Bill and the House Bill discussed prepayment as follows:

> "*PREPAYMENTS*
>
> The conferees were agreed that the Federal Reserve Board and other regulatory agencies should provide for the disclosure to the obligor at the time of the completion of a consumer credit transaction of any prepayment penalties in connection with real estate mortgages or the policy to be followed by the creditor in granting partial refund, if any, of the finance charges in case of substantial prepayment of an installment contract in terms of amount and time." Conference Report at 25-26.

Implementing this Congressional directive, the Federal Reserve Board adopted Sections 226.8(b)(6) and 226.8(b)(7) as part of Regulation Z. 12 C.F.R. §§ 226.8(b)(6)-(7) (1978). Those sections provide:

> "(b) *Disclosures in sale and nonsale credit.* In any transaction subject to this section, the following items, as applicable, shall be disclosed:
> . . . .
>
> (6) A description of any penalty charge that may be imposed by the creditor or his assignee for prepayment of the principal of the obligation (such as a real estate mortgage) with an explanation of the method of computation of such penalty and the conditions under which it may be imposed.
>
> (7) Identification of the method of computing any unearned portion of the finance charge in the event of prepayment in full of an obligation which includes precomputed finance charges and a statement of the amount or method of computa-

tion of any charge that may be deducted from the amount of any rebate of such unearned finance charge that will be credited to the obligation or refunded to the customer. If the credit contract does not provide for any rebate of unearned finance charges upon prepayment in full, this fact shall be disclosed."

5. Legislative History With Respect to Deference to Be Accorded to the Authority of the Federal Reserve Board

Section 105 of the Act, 15 U.S.C. § 1604 (1976), confers upon the Federal Reserve Board broad power to issue Regulations to implement the disclosure requirements of the Act:

> "The Board shall prescribe regulations to carry out the purposes of this subchapter. These regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate compliance therewith."

The legislative history of the Act firmly establishes the central role that Congress intended the Board to occupy in interpreting and administering the Act. The House Report states:

> "All substantive regulations in connection with the full disclosure of the terms and conditions of finance charges in credit transactions or in the advertisement of credit transactions shall be issued by the Board of Governors of the Federal

> Reserve System. No one can deny their experience and expertise in these matters. Accordingly, it is the view of your committee that, for uniformity of application to all affected segments of the industries concerned, a single set of comprehensive regulations should be issued.
>
> . . . .
>
> . . . The Board of Governors of the Federal Reserve System is to be the central single agency for issuing all regulations on credit disclosure or on the advertising of credit to insure a single set of overall standards applicable for all forms of consumer credit, while agencies already having expertise in the affected industries will be responsible for the application of such regulations to each of those industries." House Report at 18-19.

The Senate Report also underscores the Congressional desire that the Board have and exercise substantial administrative power to interpret the Act. Senate Report at 19-20.

After the Act was passed, the Board began work on the preparation of a comprehensive Regulation to implement the disclosure requirements of the Act. A draft of its Regulation was published in the Federal Register on October 18, 1968, and comments were solicited and reviewed. 33 Fed. Reg. 15506 (1968). The final version of the Regulation was published in the Federal Register on February 11, 1969 to be effective on July 1, 1969. 34 Fed. Reg. 2002-11 (1969) (codified in 12 C.F.R. § 226).

Because of the technical nature of both the Act and the Regulation, questions necessarily arose as to the proper interpretation of their various provisions.

The Board responded to these questions through both official and unofficial Board and staff pronouncements. Creditors relied upon these Board interpretations in drafting their disclosure forms. Despite the Board's broad powers under Act, *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356 (1973), and its recognized expertise, many courts declined to follow these Board interpretations and assumed a *de novo* review function with respect to the disclosure requirements of the Act and Regulation. Creditors whose forms had been drafted in careful compliance with the Board's interpretation of its own Regulation were held to have violated the Act because of new disclosure rules divined by these courts.

As a result, the Federal Reserve Board in its Annual Report to Congress for the year 1973 set forth the legislative recommendations of the National Commission on Consumer Finance. In recommending that the Act be amended to provide a defense for creditors whose forms have been drafted in conformity with Board interpretations, the Commission gave the following explanation:

> "One of the legitimate concerns of creditors who have attempted to comply in good faith with the requirements of Truth in Lending is that, although they have followed Regulation Z, a court may conclude that the Regulation is invalid and that different disclosures or procedures were mandated by the Truth in Lending Act itself. At present, the civil liability provisions of Section 130 do not necessarily preclude a finding of liability where the creditor has followed regulatory requirements which subsequently are held invalid. In order to avoid this specific inequity, a limited 'good faith reliance' provision was suggested for inclusion in the Act. It should be noted that the 'good faith *reliance*' proposal suggested by the Board and the Commission does not protect a creditor if he merely makes a simple good faith attempt at '*compliance*.' The Board proposal is as follows:
>
> § 130(f) 'No provision of this section or section 112 imposing any liability shall apply, to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Board, notwithstanding that after such act or omission has occurred, such rule, regulation, or interpretation is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.' (§ 206 of S. 2101)." 1973 Fed. Res. Bd. Ann. Rep. 22-23 (emphasis in original).

Congress responded by adding section 130(f) to the Act in 1974, using the precise language recommended by the Board and the Commission. Act of October 28, 1974, Pub. L. No. 93-495, § 406, 88 Stat. 1518. This new Section of the Act was made expressly retroactive:

> "The amendments made by sections 406 [adding § 130(f)], 407 and 408 shall apply . . . unless prior to the date of enactment of this Act such liability has been determined by final judgment of a court of competent jurisdiction and no further review of such judgment may be had by appeal or otherwise." Act of October 28, 1974, Pub. L. No. 93-495, § 408(3), 88 Stat. 1519.

The Report of the Senate Committee on Banking, Housing and Urban Affairs explained this new section as follows:

"The Truth in Lending Act is highly technical and the Committee does not believe a creditor should be forced to choose between the Board's construction of the Act and the creditor's own assessment of how a court may interpret the Act. Accordingly, the Committee recommends an amendment to Truth in Lending requested by the Board which would relieve a creditor of any civil liability under Truth in Lending for any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Board. In order to confer immunity from civil liability, the rule, regulation, or interpretation thereof must be approved by the Board itself and not merely by the staff of the Board. This amendment is contained under section 206 of Title II.

The Committee is also mindful of the uncertainty of many creditors as to whether their particular disclosure form and related procedures are in compliance with Truth in Lending and the Board's regulations. The Committee expects the Board to use its new authority under Section 206 to reduce the burden of complying with Truth in Lending. One method for accomplishing this objective would be for the Board to publish standard disclosure forms, which if adhered to, would be deemed by the Board to be in compliance with the Truth in Lending Act and the Board's regulations. In addition to removing many uncertainties and preventing hyper-technical litigation, this approach has the added advantage of encouraging standardized disclosure formats, thereby enabling consumers to become more aware of the information

disclosed." S. Rep. No. 93-278, 93rd Cong., 1st Sess. 13-14 (1973).*

In 1976, Section 130(f) was amended so that its protections would apply to interpretations by the authorized staff of the Federal Reserve Board as well as the Board itself. The section now provides:

> "(f) No provision of this section or section 1611 of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Board or in conformity with any interpretation or approval by any official or employee of the Federal Reserve System duly authorized by the Board to issue such interpretations or approvals under such procedures as the Board may prescribe therefor, notwithstanding that after such act or omission has occurred, such rule, regulation, interpretation, or approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason." 15 U.S.C. § 1640(f) (1976).

This 1976 amendment to Section 130(f) of the Act resulted from an amendment to S.2672, the State Taxation of Depositories Act, made on the floor of the House of Representatives. The language of the amendment was originally contained in H.R. 10561, sponsored by Representative Frank Annunzio. In introducing H.R.

---

*Senate Report No. 93-278 related to S.2101 which would have adopted the good faith defense of Section 130(f). S.2101 was passed by the Senate, but was not acted upon by the House of Representatives. Titles I and II of S.2101 containing the good faith defense provisions were later offered as amendments to H.R. 11221, and the amended bill was adopted by Congress on October 28, 1974 as Public Law 93-495. 88 Stat. 1500.

10561, Representative Annunzio outlined its purposes as follows:

"This act also addresses itself to the important problem of compliance with the Truth in Lending Act. Creditors are often hit with costly lawsuits for unintentional technical violations because, even though they attempt to comply, the laws and regulations are too complicated and ambiguous. An amendment to section 130f, the Good Faith Compliance with the Truth in Lending Act, I believe, will help resolve these problems.

Section 130f exempts from liability under truth in lending creditors who are acting in good faith in conformity with any rule, regulation, or interpretation by the Federal Reserve Board. The amendment adds to the exemption any interpretation or approval by an official or employee of the Board authorized by the Board to issue such interpretation or approval under such procedures as the Board may prescribe.

With formal advisory opinions, creditors will at last have a reliable way to know how to comply with truth in lending. Consumers should benefit because creditors will no longer be able to explain away violations by claiming they could not find out how to comply. Consumers, creditors, and the Board should find they are involved in less litigation." 121 Cong. Rec. 36927 (1975).

Senator Garn accepted these House amendments to S.2672 stating:

"A most needed House amendment . . . which I fully support revises section 130(f) of the Truth in Lending Act to authorize the Federal Reserve Board to delegate to an official or employee of the Federal Reserve System the power to issue binding interpretations of the Truth in Lending Act. Under the current section 130(f) a creditor is exempted from liability under truth in lending when he acts in good faith in conformity with any rule, regulations, or interpretation by the Federal Reserve Board. This amendment will encourage the Board to aid those acting in good faith to comply with the law. It is particularly needed in the case of small businesses that do not have expensive legal talent to aid them in conforming with this complex law." 122 Cong. Rec. 2836 (1976).

Senator Proxmire also urged acceptance of the House amendments:

"In addition the House amendment would authorize the Federal Reserve Board to delegate to its staff the authority to issue interpretations or approvals that would have binding effect in subsequent litigation over violations of the Truth in Lending Act. That is, compliance with such an interpretation would constitute an absolute defense to a creditor until that interpretation was reversed by higher authority.

. . . .

The Senate in turn would be accepting the House provision concerning the delegation to Federal Reserve Board staff of the authority to issue binding interpretations of the law and regulations." 122 Cong. Rec. 2837 (1976).

The Senate concurred in the House amendments to S.2672 as urged by Senators Garn and Proxmire, and the bill was signed by the President on February 27, 1976. 122 Cong. Rec. D. 234 (daily ed. Feb. 27, 1976).

APPENDIX B

OFFICIAL STAFF INTERPRETATION AND STAFF LETTERS OF THE FEDERAL RESERVE BOARD

1. Official Staff Interpretation No. FC-0054, 42 F.R. 18056, [1974-1977 Transfer Binder] Cons. Cred. Guide (CCH) ¶ 31,552 (Excerpts Dealing With Late Payment Charges) (emphasis in original)
April 4, 1977

This is in reply to your letter . . . requesting official staff interpretations of the requirements of Regulation Z with regard to computation of finance charge, disclosure of late payment charges, disclosure of loan proceeds, and the meaning of the term "meaningful sequence." This letter is an official staff interpretation of these four matters.

Staff considers the three other questions raised in your letter as inappropriate for official staff interpretations at this time. An official interpretation concerning disclosure of a dealer's reserve is deemed inappropriate because the Board has proposed for comment an amendment and an interpretation of Regulation Z on this same subject. Similarly, an official interpretation concerning whether loan proceeds must be disclosed is deemed inappropriate because this question has been raised in *Pollock v. General Finance Corporation,* a case currently pending in the United States Court of Appeals for the Fifth Circuit in which the Board filed a brief *amicus curiae.* An official interpretation of your question regarding disclosure of notary fees under § 226.8(d)(3) would be inappropriate since staff's position is not one upon which a creditor may wish to rely in a civil action. A response to that issue will, therefore, be provided in a separate unofficial staff letter to you.

To answer your remaining four questions:

(1) You ask whether a creditor's *right* of acceleration upon default by the obligor must be disclosed as a default, delinquency, or late payment charge within the context of § 226.8(b)(4). It is staff's opinion that the phrase "default, delinquency, or similar charges in the event of late payments," found in § 128(a)(9) and § 129(a)(7) of the Truth in Lending Act and § 226.8(b)(4) of Regulation Z, refers to specific sums assessed against a borrower solely because of failure to make payments when due. It is staff's opinion that the mere right to accelerate contained in a contractual provision which sets out the creditor's right to accelerate the entire obligation upon a certain event (generally the obligor's failure to make a payment when due) is not a *charge* payable in the event of late payment. Therefore, it need not be disclosed under § 226.8(b)(4).

You refer to a prior Public Information Letter, No. 851, which discusses the right of acceleration. Staff believes that letter addresses a different issue than the one posed in your letter. Staff understands that letter to say that early *payment* of the balance of a precomputed finance charge obligation by a customer upon acceleration by the creditor is essentially the same as a prepayment of the obligation. Therefore, if the creditor does not rebate unearned finance charges in accordance with the rebate provisions disclosed under § 226.8(b)(7) when the customer pays the balance of the obligation upon acceleration, any amounts retained beyond those which would have been rebated under the disclosed rebate provisions do represent the type of charge that must be disclosed under § 226.8 (b)(4).

(2) You ask a further question regarding what charges must be disclosed as default, delinquency, or late payment charges within the context of § 226.8(b)(4). Specifically, you ask whether attorney's fees and foreclosure costs assessed on a non-automatic basis at the sole discretion of the creditor need to be disclosed pursuant to that section. It is staff's opinion that, if the imposition of these charges is automatic (for example, if the charge becomes immediately due and collectible by virtue of default), the charges must be disclosed under § 226.8(b)(4). If, however, the imposition of the charge is not automatic but is conditioned upon employment of the services of an attorney to effect collection or expenditure of amounts in conjunction with foreclosure proceedings, such charge need not be disclosed under § 226.8(b)(4).

. . . .

This letter is an official staff interpretation of Regulation Z, issued in accordance with § 226.1(d)(3) of the regulation, and limited in its application to the facts and issues presented herein. I trust it will be of assistance to you.

Jerauld C. Kluckman
Associate Director

2. Staff Letter No. 851, [1974-1977 Transfer Binder] Cons. Cred. Guide (CCH) ¶ 31,173 (emphasis in original)

October 22, 1974

This is in response to your letter of June 26, inquiring whether an acceleration clause in an instalment contract is a "charge" payable in the event of late payment within the meaning of § 226.8(b)(4) of Regulation

Z and therefore must be disclosed with other required items.

For the purposes of Truth in Lending disclosures, this staff views an acceleration of payments as essentially a prepayment of the contract obligation. As such, the disclosure provisions of § 226.8(b)(7) of the Regulation, which require the creditor to identify the method of rebating any unearned portion of the finance charge or to disclose that no rebate would be made, apply. If the creditor rebates under one method for acceleration and another for voluntary prepayment, both methods would need to be identified under § 226.8(b)(7). Failure to disclose the method of rebate or nonrebate would be a violation of the Truth in Lending Act.

If, under the acceleration provision, a rebate is made by the creditor in accordance with the disclosure of the rebate provisions of § 226.8(b)(7), we believe that there is no *additional* "charge" for late payments made by the customer and therefore no need to disclose under the provisions of § 226.8(b)(4). On the other hand, if upon acceleration of the unpaid remainder of the total of payments, the creditor does not rebate unearned finance charges in accordance with the rebate provisions disclosed in § 226.8(b)(7), any amounts retained beyond those which would have been rebated under the disclosed provisions represent a "charge" which should be disclosed under § 226.8(b)(4).

Frederic Solomon
Director

3. Staff Letter No. 1208, [1974-1977 Transfer Binder] Cons. Cred. Guide (CCH) ¶ 31,647 (emphasis in original)

July 6, 1977

This is in reply to your letter . . . requesting clarification of Official Staff Interpretation FC-0054, which discussed the right of acceleration.

In FC-0054, staff took the position that a creditor's right of acceleration upon default by the obligor need not be disclosed as a default, delinquency, or late payment charge within the context of § 226.8(b)(4). The interpretation went on to state, however, that since early payment of the balance of an obligation upon acceleration is essentially the same as voluntary prepayment, if the creditor does not rebate unearned finance charges in the former situation in accordance with the rebate provisions disclosed under § 226.8 (b)(7), any extra amounts retained represent the type of charge that must be disclosed under § 226.8(b)(4).

You state that frequently a disclosure statement will include a provision concerning rebate of unearned finance charges upon prepayment, but contains no referece [*sic*] to the right of acceleration in the event of default. The promissory note to which the statement relates, however, often does contain an acceleration clause stating that "the entire then remaining unpaid balance hereof shall . . . be immediately due and payable . . . ," making no reference to any rebate in the event of payment after acceleration. You state that some creditors have a policy of providing rebates upon early payment after acceleration, while others do not. You suggest that where the contract is silent concerning rebate upon prepayment after acceleration, it must be assumed that such a rebate is *not* provided,

and, therefore, the disclosure statement must make the § 226.8(b)(4) disclosure discussed above.

Staff does not agree with your analysis of this situation. The fact that the contract is silent concerning rebate upon prepayment after acceleration is not determinative of the issue; the question is whether in fact the creditor does or does not rebate upon prepayment after acceleration in accordance with the rebate method shown on the disclosure statement. In this sense, then, the individual creditor's policy determines whether there is a violation of the Act and regulation.

This is an unofficial staff interpretation of Regulation Z. Although you requested issuance of an official staff interpretation, we believe that to be inappropriate in these circumstances since your question does not appear to staff to involve a technical ambiguity in the regulation.

Jerauld C. Kluckman
Associate Director

4. Staff Letter No. 1324, Cons. Cred. Guide (CCH) ¶ 31,827

November 14, 1978

This is in response to your letter . . . in which you request an interpretation of § 226.8(b)(4) of Regulation Z, which requires disclosure of the amount or method of computing the amount of any default, delinquency, or similar charges which may be imposed in connection with a credit transaction.

Specifically, you ask whether a disclosure is required under § 226.8(b)(4) where a credit agreement gives the creditor the right, upon the customer's default, to accelerate payment of the entire indebtedness, includ-

ing unearned finance charges, but State law requires a rebate of unearned finance charges in such circumstances.

Your question is answered in part by reference to Official Staff Interpretation FC-0054 and Public Information Letter 1208, copies of which are enclosed. The staff's position, as expressed in those interpretations, is that if a creditor rebates unearned finance charges in connection with prepayment upon acceleration using the same method as for voluntary prepayment and that method has been properly disclosed in accordance with § 226.8(b)(7), there is no default charge. However, any amounts retained by a creditor upon acceleration which would have been rebated under the disclosed rebate provisions would represent the type of default charge which must be disclosed pursuant to § 226.8(b)(4).

Applying the foregoing to the situation you pose, the staff believes that if a creditor in fact rebates unearned finance charges in connection with prepayment upon acceleration in accordance with State law and, as a result, the customer receives the same rebate as would be received under the disclosed rebate method, then prepayment upon acceleration would not involve any default charge.

Conversely, any unearned finance charges retained by a creditor in connection with prepayment upon acceleration, which would not be retained under the disclosed rebate calculation method, would constitute a default charge which must be disclosed under § 226.8(b)(4). This is so whether the excess charges are retained pursuant to the creditor's apparent contract right or because the rebate method prescribed by State

law results in a lesser rebate than the method disclosed.

There is an additional consideration which the staff would also call to your attention. Even where a creditor's policy is to rebate unearned finance charges in the event of prepayment upon acceleration in accordance with State law, so that no charges are retained in excess of those indicated by the disclosed rebate method, a statement in the underlying contract which apparently gives the creditor the right to retain such unearned finance charges may mislead a customer into believing that there will be no rebate upon acceleration. Such a contractual provision, if supplied to a customer with rebate method disclosure required by § 226.8(b)(7) (e.g., as part of a combined note and disclosure form or where separate note and disclosure forms are presented to the customer simultaneously), would constitute additional information within the meaning of § 226.6(c) of Regulation Z. If this additional information is misleading or confusing or contradicts, obscures, or detracts attention from the required § 226.8(b)(7) disclosure, there would be a violation of the regulation. Of course, the capacity of the additional information to mislead or confuse can only be determined by reference to all of the circumstances of a particular case.

You note that the question of disclosure of the right of acceleration has been the subject of litigation in various jurisdictions. The views expressed in this letter and the enclosed interpretations represent the staff's opinion on this issue. However, it would be advisable for creditors to be aware of court holdings in their particular jurisdiction (some of which may be contrary to the staff's position) so that they may

determine the most prudent course to follow. The particular case which you cite, *McDaniel v. Fulton National Bank of Atlanta,* 571 F.2d 948 (5th Cir. 1978), however, would appear to be consistent with the staff's views. In fact, the court in that case relied in part upon FC-0054 in reaching its decision.

This is an unofficial staff interpretation of Regulation Z, limited in its applicability to the facts and issues discussed above. If you desire further assistance, please contact this office or Mr. Richard A. Dill, Assistant Vice President, Department of Supervision and Regulation, Federal Reserve Bank of Atlanta, Atlanta, Georgia 30303.

Glenn E. Loney
Section Chief

Service of the within and receipt of a copy thereof is hereby admitted this .... day of August, A.D. 1979.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1487

FORD MOTOR CREDIT COMPANY, *et al.*,
Petitioners,

v.

DENNIS MILHOLLIN, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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BRIEF FOR THE RESPONDENTS

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

In addition to the citations of Petitioners. Regulation Z, 12 C.F.R. §226.6(c) (1977):

"At the creditor's or lessor's option, additional information or explanations may be supplied with any disclosure required by this Part, but none shall be stated, utilized, or placed so as to mislead or

confuse the customer or lessee or contradict, obscure, or detract attention from the information required by this Part to be disclosed."

QUESTIONS PRESENTED

The questions presented by Petitioners also concerns:

1. Whether the existence of an acceleration clause in a consumer credit contract which also contains a clause providing for a rebate of finance charges upon prepayment in full prior to the maturity of the obligation has the capacity to violate the provisions of §226.6(c) of Regulation Z.

STATEMENT OF THE CASE

In July of 1974, Dennis and Michelle Milhollin agreed to purchase a used 1973 Ford Pinto station wagon automobile from Dee Thomason Ford (hereinafter the "Dealer"), a Lake Oswego, Oregon automobile dealership. (J.A. 9).[1] Since the Milhollins were unable to pay the full cash price of the automobile, they applied to Ford Motor Credit Corporation (hereinafter the "Finance Company") for financing. (*Mil.* R. 293) When the Finance Company agreed to extend the necessary credit, the Dealer had Mr. and Mrs. Milhollin

[1]On the date of purchase Dennis Milhollin was 19 years old and Michelle Milhollin was 20 years old. Each was employed. Throughout the course of this litigation the Respondents have been referred to as "Milhollin". However, Respondents surname is actually spelled "Millhollin". (J.A. 9)

sign the Finance Company's standard "Oregon Automobile Retail Installment Contract (FMCC July 74 11236)." (J.A. 9, 10) The front of this form, in addition to containing contractural provisions, also served as a disclosure statement for the purposes of the Truth in Lending Act and Regulation Z. The back of the form contained additional contractural provisions. The Finance Company supplied this form contract to the Dealer for use in the Dealer's credit transactions.[2]

The cash price of the station wagon was $3,098.00, while the deferred payment price was $3,984.64; a sum which reflected a finance charge, the premium for credit life insurance on Dennis Milhollin's life, and lien recording fees. (J.A. 9)

Mr. and Mrs. Milhollin made a downpayment of

[2]At the time of sale and extension of credit, the Milhollins and Miss Donna Eaton, the other respondent, (hereinafter "Consumers") dealt only with their respective automobile dealers. (Miss Eaton dealt with Bud Meadows Mazda, a Portland automobile dealership). (J.A. 61,65) Each dealer offered the extension of credit, presented Consumers with credit applications and pre-printed form installment contracts, and made all of the explanations of the transactions. (*Mil* R. 198-200, 291-2; J.A. 67) However, the Finance Company periodically supplied the Dealers with the credit applications and the retail installment contracts which the Dealers used in their transactions. (*Mil* R. 99, 101; *Eaton* R. 74, 75)

The Dealers assigned the contracts to the Finance Company pursuant to the terms in a Master Agreement, (J.A. 16; *Eaton* R. Conn dep. 8) and neither Dealer financed their own contracts. (*Mil* R. 82, 99; *Eaton* R. Conn dep. 6). At the time the transactions were consummated it was the intention of each Dealer to assign the contract to the Finance Company, and the Finance Company accepted for financing the substantial majority of the contracts tendered. (*Mil* R. 82, 99, 292; *Eaton* R. Conn dep. 7, 20)

$900.00,[3] and agreed to pay the outstanding total of payments of $3,084.64 by making 36 monthly installment payments of $85.86, with the payments due on the 29th day of each month. (J.A. 9)[4]

If the Milhollins were more than ten days late with any payment, Finance Company's form contract imposed a delinquency charge of the lesser of 5% of the late payment of $5.00.

> (12) Delinquency Charges: Buyer hereby agrees to pay a delinquency charge on each installment in default for more than 10 days in the amount of 5% thereof or $5.00, whichever is less, plus such expenses incurred by Seller in affecting collection hereunder as may be allowed by law.

This delinquency charge was the only disclosure on the face of the contract which contained any information concerning the consequences of a late payment. (J.A. 9)

The compacted print on the reverse of the contract contained a clause whereby the Finance Company reserved the right to declare "all amounts due or to become due" under the contract "to be immediately due and payable" without notice or qualification, and without regard to the ten day grace period disclosed on

[3] A cash downpayment of $400.00, a $300.00 credit for the trade-in of their old automobile, and a $200.00 pickup payment paid on August 12, 1974. (J.A. 9, 16)

[4] Under the contract the Milhollins, at any time prior to maturity, could prepay the outstanding total of payments in full. Upon such prepayment, Finance Company would rebate the unearned portion of the finance charge under the "sum of the digits" formula after first taking an acquisition fee of $15.00.

the face of the contract.[5] This right of acceleration became enforceable in the event the Milhollins committed any of a number of acts, including defaulting on any payment.

This contractual right to accelerate the maturity of the obligation did not provide for a rebate to the consumer of any unearned finance charges, whether determined as of the accelerated maturity date or upon the date of some subsequent actual payment.

Shortly after the purchase of the automobile both Dennis and Michelle Milhollin became unemployed and were forced to seek financial assistance from the local public welfare department. (*Mil* R. 31)[6] The Milhollins missed the installments which were due on December 29, 1974 and January 20, 1975,[7] and on February 21,

[5] The clause appears in paragraph 19, which provides in part:

> Time is of the essence of this contract. In the event Buyer defaults in any payment, or fails to obtain or maintain the insurance required hereunder, or fails to comply with any other provision hereof, or a proceeding in bankruptcy, receivership or insolvency shall be instituted by or against Buyer or his property, or Seller deems the Property in danger of misuse or confiscation, or Seller otherwise reasonably deems the indebtedness or the Property insecure, *Seller shall have the right to declare all amounts due or to become due hereunder to be immediately due and payable* and Seller shall have all the rights and remedies of a Secured Party under the Uniform Commercial Code, including the right to repossess the Property wherever the same may be found. . . . (emphasis supplied) (J.A. 10)

[6] Mr. and Mrs. Milhollin have proceeded *in forma pauperis* throughout the course of this litigation. They were initially represented by attorneys from Multnomah County Legal Aid, a publically funded office of the National Legal Services Corporation.

[7] The Milhollins made the following payments under the contract: August 12, 1974–$200; August 26, 1979–$85.68; November 19, 1974–$85.68; December 2, 1974–$85.68; December 16, 1974–$85.68. (J.A. 19)

1975, the Finance Company, without advance notice, repossessed the automobile. (J.A. 9, 17, 19; *Mil* R. 95) On the same day as the repossession Dennis and Michelle Milhollin contacted the Finance Company in an attempt to recover their automobile. The Finance Company advised them that it considered the Milhollins delinquent in the amount of $171.36, consisting of two delinquent installments of $85.68 each. Mr. and Mrs. Milhollin offered immediately to pay the Finance Company the entire delinquent amount of $171.36 but the Finance Company refused to return the automobile unless the Milhollins paid $2,440.42. (J.A. 17, 18, 20) Mr. and Mrs. Milhollin were unable to pay the accelerated $2,440.42, and consequently lost not only the possession of the station wagon but also the benefit of the $1,242.72 which they had already paid to the Finance Company.[8]

Mr. and Mrs. Milhollin subsequently filed an action against the Dealer and the Finance Company for statutory damages under the Truth in Lending Act, alleging that the Defendants failed to clearly disclose certain essential credit terms prior to the execution of the contract.[9]

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[8]This sum consisted of a $900.00 downpayment plus four installments of $85.68.

[9]Donna Eaton suffered virtually identical treatment from the Finance Company. After purchasing an automobile she became ill and was forced to terminante her employment and seek public assistance. (*Eaton* Eaton dep. 14, R. 70). She missed some of her installment payments whereupon the Finance Company accelerated the balance of her contract and took possession of the automobile. (*Eaton* R. 70) Ms. Eaton lost the posession of her automobile as well as the benefit of the $1,438.84 which she had previously paid to the Finance Company. (J.A. 65, *Eaton* R. 64)

SUMMARY OF ARGUMENT

1. The Truth in Lending Act (herein "the Act") was enacted in 1968 by Congress for the express purpose of promoting the informed use of consumer credit by the American consumer. Congress determined that the informed use of credit results from an awareness of the cost thereof, and therefore the Act requires creditors to disclose essential credit terms in a clear, conspicuous and meaningful manner. 15 USC §1601; *see Mourning v. Family Publications Services, Inc.*, 411 US 356 (1973).

Pursuant to authority granted in the Act, the Federal Reserve Board promulgated Regulation Z, 12 CFR §226.1 *et seq*, which contains the enforcing regulations implementing the Act. Among the significant disclosure requirements of Regulation Z are §226.8(a) which requires all disclosures to be made before the transaction is consummated, and §226.8(a)(1) which requires all of the disclosures to be made together on the same side of the same page and above the place for the customers signature.

These consolidated cases present important issues in connection with consumer credit contracts and the disclosure requirements of the Truth in Lending Act and Regulation Z. These issues all pertain to contractural acceleration clauses and whether these clauses and their effect on unearned finance charges is information which must be disclosed to consumers pursuant to the provisions of Regulation Z.

The initial question pertains to whether Regulation Z encompasses these clauses, and if so, then under what circumstances and to what extent must they be dis-

closed on the face of a contract? Second, does the contract of the Petitioner violate the disclosure provisions of the Act and Regulation Z for failing to meaningfully disclose an acceleration clause and its effect on the finance charge?

2. Installment contracts typically grant the customer the right to terminate the contract prior to its maturity by prepaying the obligation. In this situation the customer will often be entitled to a rebate of unearned finance charges under the contract since the customer has not had the use of the creditor's money (credit) for as long as the parties had anticipated at the inception of the transaction.

Installment contracts also typically contain an acceleration clause, which is a provision which allows the creditor to accelerate the maturity of the contract and demand immediate payment of the obligation from the consumer. Like the process of voluntary prepayment, acceleration of the contract balance also causes an early termination of the contract, thereby raising the possibility of a rebate of unearned finance charges.

Acceleration clauses are usually located on the reverse of the contract or on a separate document from that which contains the required disclosures. These same contracts commonly disclose on their face that in the event of prepayment in full of the obligation the consumer will be entitled to at least a partial rebate of unearned finance charges. This disclosure will also usually contain a description of the method by which the finance charge rebate will be calculated (e.g., "sum of the digits" or "Rule of 78's").

3. The Federal Reserve Board has promulgated §226.8(b)(7) of Regulation Z, which requires the

disclosure of the method to be used in computing any unearned portion of the finance charges in the event of prepayment in full of the obligation. If the contract does not provide for a rebate upon prepayment in full, this Regulation requires that fact to be disclosed. As with all consumer protection statutes, the terms of the Act should be liberally construed in favor of the consumer as the class of person it was intended to protect.

4. The Ninth Circuit and the opinion letters issued by the members of the Federal Reserve Board Staff correctly assert that the process of acceleration is equated to prepayment of the contract obligation, thereby bringing acceleration under the disclosure requirements of §226.8(b)(7). Early termination of the contract by either prepayment or acceleration affects the amount of the finance charge which has been earned by the creditor, and this potential cost to the customer is information which should be clearly and meaningfully disclosed under the Act and Regulation Z.

5. If a creditor rebates under one method for acceleration and another for voluntary prepayment, both methods need to be identified under §226.8(b)(7). *See* Staff Opinion Letter No. 851. This assures disclosure to the consumer of meaningful information concerning the various costs of credit, as intended by the Truth in Lending Act. 15 USC §1601.

The acceleration clause disclosed on the back of the contract used by the Finance Company unequivocably entitles the Finance Company to collect the entire unpaid balance of the contract, including all unearned finance charges. Since the Finance Company did not meaningfully disclose on the face of its contract either

the acceleration clause or anything approximating its effect or unearned finance charges, the disclosure provisions of §226.8(b)(7) of Regulation Z have been violated. *See* Staff Letter No. 851; Official Interpretation No. FC-0054.

6. Under the regulations the creditor is prohibited from including in a contract additional information which has the capacity to mislead or which contradicts or obscures a required disclosure. *See* §226.6(c) of Regulation Z. Specifically, a creditor may not disclose a rebate method on the front of the contract if the acceleration clause on the back of the contract implies or states that there will be no rebate upon acceleration. *See* Staff Opinion Letter No. 1324.

The Finance Company asserts that its undisclosed and nonbinding rebate policy for acceleration is identical with that disclosed on the face of the contract for prepayment. However, the acceleration clause in the contract not only directly contradicts this assertion, but would lead a customer into reasonably believing that upon acceleration there would be no rebate of finance charges. The Finance Company has therefore violated the requirements of §226.6(c) of Regulation Z.

7. The purpose of the Truth in Lending Act is to provide meaningful disclosures of credit terms to consumers in order to foster the informed use of credit. The Finance Company argues that its disclosure of a rebate method for voluntary prepayment adequately communicates to the consumer that these same rebate methods will be used for acceleration as well.

In fact it is unreasonable to assume that any consumer will understand the term prepayment to somehow include acceleration. Moreover, the prepay-

ment disclosure used by the Finance Company is limited to voluntary prepayment prior to maturity of the obligation; acceleration on the other hand is an involuntary imposition on the consumer which matures the entire debt. There is no meaningful disclosure of acceleration.

8. The ruling of the Ninth Circuit was in accord with the important premises of the Federal Reserve Board staff letters on the issue of disclosure of the effect of acceleration. However, the Ninth Circuit has fashioned a disclosure rule which avoids the inconsistencies of the staff letters and insures a meaningful disclosure of the effect of acceleration.

The staff letters of the Federal Reserve Board require a separate disclosure of rebate methods only if the rebate method disclosed for prepayment is different from that used upon payment after acceleration. In all other cases the face of the contract is silent as to acceleration or its effect on the finance charge.

A consumer who reads the underlying contract to determine whether there will be a finance charge rebate upon acceleration may find either an acceleration clause identical to that used by the Finance Company herein and which clearly grants the creditor the right to retain all unearned finance charges, or an acceleration clause which is ambiguous as to the right to receive a rebate. In these instances the acceleration clause either contradicts the prepayment disclosure or misleads the consumer, in violation of §226.6(c) of Regulation Z. *See* Staff Opinion letter No. 1324.

A consumer may also find an acceleration clause which provides for a rebate of finance charges but does not disclose the method of computing the rebate. In

this instance the staff of the Federal Reserve Board suggests that undisclosed creditor rebate policy or state consumer credit statutes would explain the method. *See* Staff Opinion letters No. 1208, 1324. In either of these instances, however, it is unrealistic to assume that the consumer will be able to ascertain the undisclosed policy, or be familiar with the differing, and often intricate, state statutes. Both alternatives suggested by the staff are contrary to the purpose of the Act of providing meaningful disclosure, and are problems avoided by the rule of the Ninth Circuit.

9. Congress intended that the primary enforcement mechanism of the Act would be litigation by the consumer. Congress encouraged this enforcement by providing for guaranteed minimum damages for the successful consumer litigant, but with a one year limitation period commencing at the date of the transaction. However, by not uniformly requiring separate rebate disclosures for prepayment and acceleration the Federal Reserve Board staff assumes that until the actions of the creditor regarding rebate reflects otherwise, the prepayment disclosure also reflects creditor's rebate method for acceleration.

Once the one year limitation has expired, a creditor might simply alter its prior undisclosed and non-binding rebate policy, and not rebate upon acceleration. Though such a change would render the original disclosure meaningless, the consumer would not be able to utilize the enforcement mechanism of the Act.

10. While the Federal Reserve Board staff has adopted an approach to the issue of rebates upon acceleration which is in accord with the principles of Truth in Lending, certain of the statements in the staff

opinions are not entitled to great deference by the Courts since they are not regulations issued by the Board itself, and they do not reflect the necessary thoroughness of consideration. Application of these certain positions would create obstacles to insuring that the consumer receives meaningful credit information, and therefore would not be reasonably related to the purposes of the Truth in Lending.

CONCLUSION

The rule of the Ninth Circuit and the basic approach of the Federal Reserve Board staff are in accord with the principle that the effect on the finance charge is important information to be disclosed to the consumer under the provisions of the Truth in Lending Act. However, application of certain of the statements of the Board fail to guarantee the consumer consistently meaningful disclosure of the important information. The approach of the Ninth Circuit avoids these problems while fostering the goals of the Truth in Lending Act, and the judgement below should be affirmed based on the analysis in *St. Germaine v. Bank of Hawaii*, 573 F.2d 572 (9th Cir. 1977).

ARGUMENT

I.

CONGRESS ENACTED THE TRUTH IN LENDING ACT TO PROTECT CONSUMERS THROUGH THE MEANINGFUL DISCLOSURE OF THE ESSENTIAL COSTS AND TERMS OF CONSUMER CREDIT CONTRACTS.

The Truth in Lending Act was passed by Congress in 1968 as part of an effort to relieve consumers from certain divergent, and often fraudulent, creditor practices in connection with the disclosure of credit terms. 15 USC §1601; *Mourning v. Family Publications Service, Inc.*, 411 US 356, 364 (1973). Writing in *Mourning*, Chief Justice Burger reviewed the legislative underpinning of the Truth in Lending Act as follows:

> Passage of the Truth in Lending Act in 1968 culiminated several years of Congressional study and debate as to the propriety and usefulness of imposing mandatory disclosure requirements on those who extend credit to consumers in the American market. By the time of passage, it had become abundantly clear that the use of consumer credit was expanding at an extremely rapid rate. From the end of World War II through 1967, the amount of such credit outstanding had increased from $5.6 billion to $95.9 billion, a rate of growth more than 4½ times as great as that of the economy. Yet, as the congressional hearings revealed, consumers remained remarkably ignorant of the nature of their credit obligations and of the costs of deferring payment. *Because of the divergent, and at times fraudulent, practices by which consumers were informed of the terms of the credit extended to them, many consumers were prevented from shopping for the best terms available and, at times, were prompted to assume liabilities they could not meet.* Joseph Barr, the Under Secretary of the Treasury, noted in testifying before a Senate subcommittee that such blind economic activity is inconsistent with the efficient functioning of a free economic system such as ours, whose ability to provide desired material at the lowest cost is dependent on the asserted preferences and informed choices of consumers. *Mourning v. Family Publications*, 411 US at 363-364 (emphasis supplied).

Congress determined that the most effective method of preventing consumer abuse, while promoting a new credit awareness on the part of the consumer, was through the requirement of meaningful disclosure of essential credit terms.[10] Consequently, the thrust of the Truth in Lending Act is disclosure, the "erecting [of] a barrier between the seller and the prospective purchaser in the form of hard facts" which would equip the consumer with the information necessary to make an

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[10]This Congressional determination is incorporated into the statement of the purpose of the Act, at 15 USC §1601:

> The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this title to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.

informed credit purchase. *Mourning v. Family Publications*, 411 US at 377.

The fundamental guarantees of the Act's effectiveness are the twin requirements of prospective disclosure and clarity of disclosure. *See Ratner v. Chemical Bank New York Trust Company*, 329 F. Supp. 270, 276 (S.D.N.Y. 1971). The Act requires that all disclosures of credit terms be made prior to the point at which a consumer enters into a binding contract, for it is only through prospective disclosure that the consumer will be able to compare the various credit terms available and thereby avoid the uniformed use of credit.[11]

The second requirement of clarity of disclosure is more aptly entitled "meaningfulness of disclosure." "The Truth in Lending Act reflects a transition in congressional policy from a philosophy of 'Let the buyer beware' to one of 'Let the seller disclose'." *Mourning v. Family Publications*, 411 US at 377. However, a disclosure reflects this transition only if it provides meaningful credit information to the prospective consumer; information which is pertinent, clear and allows the consumer the opportunity to make an

[11]When Congress passed Truth in Lending Act it authorized the Federal Reserve Board to promulgate regulations to enforce the purpose of the Act. 15 USC §1604. These regulations are embodied in Regulation Z at 12 CFR §226.1, *et seq.* §226.8(a) of Regulation Z provides that all disclosures shall be made before the transaction is consumated.

informed credit choice.[12]

The Act attempts to guarantee meaningful disclosure by minimizing the amount of unclear terminology and ambiguities traditionally contained in consumer credit contracts, thereby reducing the opportunity for the creditor to assert the standard of " 'words mean what I say they mean', [which] is touted in Alice in Wonderland." *Woods v. Beneficial Finance Co. of Eugene*, 395 F. Supp. 9, 14 (D. Or. 1975). *See also Mourning v. Family Publications*, 411 US at 363. Regulation Z accomplishes this goal by providing that certain credit provisions *must* be disclosed through the use of mandatory terminology,[13] and requiring the creditor to dis-

[12]Chief Justice Burger noted in *Mourning* that: "Some may cliam that it is a relatively easy matter to calculate the total payments to which petitioner was committed by her contract with respondent; but at the time of sale, such computations are often not encouraged by the solicitor or performed by the purchaser." *Mourning v. Family Publications*, 411 US at 377.

This reasoning is applicable to any of the disclosures required by the terms of the Truth in Lending Act or Regulation Z. The disclosure should be understandable at the time of the transaction by average credit ignorant consumer.

> The purpose of that statute is to permit the ordinary consumer, without regard to his degree of commercial sophistication, to receive the kind of credit information that will allow him effectively to compare the credit terms being offered in the marketplace and thus to 'shop' for the most favorable terms available (15 U.S.C. §1601).
> *In the Matter of Beauty-Style Modernizers*, 83 F.T.C. 1761, 1779 (1974).

See Grey v. European Health Spas, Inc., 428 F. Supp. 841, 846 (D. Conn. 1977); *Ratner v. Chemical Bank New York Trust Co.*, 329 F. Supp at 276; *In the Matter of Zale Corp.*, 78 F.T.C. 1195 (1971), aff'd, 473 F2d 1317 (5th Cir. 1978).

[13]E.g. §226.8(c)(8)(i) requires use of the term "finance charge".

close other credit information clearly and conspicuously.[14]

A. The Existence of An Acceleration Clause and Its Effect on Unearned Interest Is Information Which Should Be Meaningfully Disclosed To The Consumer.

The circumstances under which an obligation may be terminated prior to maturity, and the effect which such a premature termination has on the finance charge, is the type of information which must be clearly and conspicuously disclosed to the consumer if the consumer is to receive meaningful information regarding essential credit terms, and thereby make an informed credit clause. 15 U.S.C. §1601.

Consumer installment contracts typically permit the buyer to prepay the obligation prior to maturity. Since the amount of the finance charge is computed at the inception of the obligation as if the contract will run it's full term, upon early termination the consumer will generally be entitled to a partial rebate. Since this finance charge adjustment will affect the ultimate cost of the credit, it is necessary for the consumer to understand prior to entering into the obligation exactly how and under what circumstances the finance charge will be adjusted if the contract is prepaid.

This same reasoning is applicable to acceleration clauses. These clauses are contained in the majority of

[14]E.g. §226.8(b(5) requires the meaningful disclosure of "a description or identification of the type of any security interest held or to be retained". The exact terminology to be used in the disclosure is left to the creditor.

consumer installment contracts. Note, 53 Ind. L.J. 97 (1977-78). They grant a creditor the right to demand immediate payment of the entire unpaid balance of an obligation upon the occurrence of some event, typically a late payment or other act of default by the consumer. II Gilmore, Security Interests in Personal Property, §43.4 (1965). Such an acceleration also involves an early termination of the contract and, like prepayment, often involves an adjustment of the finance charge.[15] However, unlike the situation involving early payment of the contract, an unexpected acceleration can also have a devastating financial effect on the consumer.[16] Consequently, as recognized by the United States in their Amicus Brief:

> [T]he [Federal Reserve] Board staff recognized that the process of acceleration may subject the borrower to additional costs that must be disclosed

[15]This is in accord with the position of the Solicitor General:

> Because the finance charge is included in the amount of the debt at the inception of the contract, exercise of either the creditor's right to accelerate or the debtor's right to prepay in full requires a determination of the amount owing at the time the right is exercised. To determine the amount owed, it is necessary to compute how much of the finance charge added to the original debt (precomputed finance charge) has been earned and how much will be credited (rebated) to the consumer. This computation must be made whether the borrower discharges the obligation or whether the creditor seizes the collateral and sells it to satisfy the the outstanding balance.
> Amicus Brief of United States, 10.

[16]Mr. and Mrs. Milhollin lost their automobile to the Finance Company even though they tendered the delinquent payments because they were unable to immediately pay the accelerated balance of their contract.

> if the consumer is to be "given the information he needs to compare the cost of credit and to make the best informed decision on the use of credit." H.R. Rep. No. 1040, 90th Cong., 1st Sess. 13 (1967). Amicus Brief of United States, 12.

The Federal Reserve Board and the government each recognize that it is important that the consumer be given information concerning the potential adjustment of the finance charge upon acceleration. The only disclosure on the face of the Finance Company's contract which addresses this potential adjustment, reads:

> Prepayment Rebate: Buyer may prepay his obligations under this contract in full at any time prior to maturity of the final installment hereunder and if he does so, shall receive a rebate of the unearned portion of the Finance Charge computed under the sum of the digits method after first deducting an acquisition fee of $15.00. No rebate will be made if the amount is less than $1.00. (J.A. 9, 65)

The question before the Court is whether this disclosure is sufficient under the regulations issued by the Federal Reserve Board and the purposes of the Truth in Lending Act to give the consumer meaningful information regarding acceleration and its effect on the finance charge.

B. The Truth in Lending Act Should Be Liberally Construed In Favor of the Consumer.

The Court should consider this question in light of a principle of interpretation which is applied to the

provisions of the Truth in Lending Act, and which is often applied to remedial legislation: the statute should be construed to achieve the protection of the class whom the drafters sought to assist. In *N. C. Freed Co., Inc. v. Board of Governors of the Federal Reserve System*, 473 F.2d 1210 (2nd Cir. 1973), the court explained:

> The Act is remedial in nature, designed to remedy what Congressional hearings revealed to be unscrupulous and predatory creditor practices throughout the nation. Since the statute is remedial in nature, its terms must be construed in liberal fashion if the underlying Congressional purpose is to be effectuated. 437 F.2d at 1214.

Subsequent cases have applied this principle to numerous aspects of the Truth in Lending Act. *See Mirabal v. General Motors Acceptance Corp.*, 537 F.2d 871, 878 (7th Cir. 1976); *Zeltzer v. Carte Blanche Corporation*, 514 F.2d 1156, 1164, fn. 21 (3rd Cir. 1975); *Sellers v. Wollman*, 510 F.2d 119, 122 (5th Cir. 1975); *Eby v. Reb Realty, Inc.*, 495 F.2d 646, 650 (9th Cir. 1974); *Littlefield v. Walt Flanagan & Co.*, 498 F.2d 1133, 1136 (10th Cir. 1974); *Thomas v. Meyers-Dickson Furniture Co.*, 479 F.2d 740, 748 (5th Cir. 1973); *Gardner and North Roofing and Siding Co. v. Board of Governors of the Federal Reserve System*, 464 F.2d 838, 841 (D.C. Cir. 1972).

II.

THE PUBLIC PRONOUNCEMENTS OF THE FEDERAL RESERVE BOARD STAFF AND THE POSITION OF THE GOVERNMENT ARE CONSISTENT WITH THE RULING OF THE COURT BELOW THAT THE FINANCE COMPANY'S CONTRACT VIOLATED THE DISCLOSURE PROVISIONS OF §226.8(b)(7) OF REGULATION Z.

A. As Evidenced By The Pronouncements of The Federal Reserve Board Staff and The Position of the Solicitor General, the Finance Company Has Violated the Provisions of §226.8(b)(7) of Regulation Z.[17]

The Federal Reserve Board staff has consistently equated an acceleration of payments with a prepayment of the contract obligation, thereby bringing acceleration

[17]§226.8(b)(7) of Regulation Z provides:

(b) Disclosures in sale and nonsale credit. In any transaction subject to this section, the following items, as applicable, shall be disclosed:

. . .

(7) Identification of the method of computing any unearned portion of the finance charge in the event of prepayment in full of an obligation which includes precomputed finance charges and a statement of the amount of method of computation of any charge that may be deducted from the amount of any rebate of such unearned finance charge that will be credited to an obligation or refunded to the customer. If the credit contract does not provide for any rebate of unearned finance charges upon prepayment in full, this fact shall be disclosed.

within the disclosure requirements of §226.8(b)(7):[18]

> For the purposes of Truth in Lending disclosures this staff views an acceleration of payments as essentially a prepayment of the contract obligation. As such, the disclosure provisions of §226.8(b)(7) of the Regulation, which require the creditor to identify the method of rebating any unearned portion of the finance charge or to disclose that no rebate would be made, apply. If the creditor rebates under one method for acceleration and another for voluntary prepayment, both methods would need to be identified under §226.8(b)(7). Failure to disclose the method of rebate or nonrebate would be a violation of the Truth in Lending Act. Public Information Letter No. 851, [1974-1977, Transfer Binder] Cons. Cred. Guide (CCH) paragraph 31, 173 (October 22, 1974).

The face of the Finance Company's contract discloses that the buyer may prepay the obligation and thereby receive a rebate of the unearned portion of the finance charge computed under the sum of the digits method. The Finance Company did not disclose on the front of the contract either the existence of an acceleration clause or its effect on unearned interest.

The only reference on the face of the contract to default and the consequences thereof specified that any payment more than ten days late would result in an

[18]*See* Official Staff Interpretation No. FC-0054, (1974-1977 Transfer Binder), Cons. Cred. Guide (CCH), paragraph 31, 552 (April 4, 1977), which states: "Staff understands that letter to say that early *payment* of the balance of a precomputed finance charge obligation by a customer upon acceleration by the creditor is essentially the same as a prepayment of the obligation." (emphasis in original)

additional fee of the lesser of $5.00 or 5% of the delinquent installment payment. (J.A. 9, 65).

However, the reverse of the contract specifies that under certain circumstances, including a default by the customer, the Finance Company may accelerate the entire unpaid balance of the contract.

> [S]eller shall have the right to declare all amounts due or to become due hereunder to be immediately due and payable . . . (J.A. 10, 66).

Without equivocation or ambiguity, this provision entitles the Finance Company to collect the entire unpaid balance of the contract, including principal, earned finance charges, and unearned finance charges.[19] In regard to the rebate of finance charges, the contract is not silent; there is no allowance for a finance charge rebate, either at the time of the acceleration or in the event of some type of subsequent payment by the consumer. There is no statement that the credit contract does not provide for any rebate of unearned finance charges.

Since this method of rebate, or more accurately the lack thereof, in the event of acceleration is significantly different from anything disclosed on the face of the contract, the Finance Company has violated the provisions of §226.8(b)(7). *See* Federal Reserve Board Official Staff Interpretation No. FC-0054; Federal Reserve Board Staff Opinion Letter No. 851.

[19]On one other occasion the Finance Company has not deemed itself bound by its undisclosed policy. In *Block v. Ford Motor Credit Company*, 286 A2d 228 (D.C. App. 1972), the Finance Company asserted that an acceleration clause virtually identical to the clause involved herein entitled the Finance Company to all unearned finance charges.

B. As Evidenced By the Pronouncements of the Federal Reserve Board Staff, the Finance Company has Violated the Provisions of §226.6(c) of Regulation Z.

The Finance Company has violated the provisions of § 226.6(c) of Regulation Z which provides:

> At the creditor's or lessor's option, additional information or explanations may be supplied with any disclosure required by this Part, but none shall be stated, utilized, or placed so as to mislead or confuse the customer or lessor or contradict, obscure, or detract attention from the information required by the Part to be disclosed.

In connection with acceleration clauses, the Federal Reserve Board Staff has interpreted this regulation as follows:

> [A] statement in the underlying contract which apparently gives the creditor the right to retain such unearned finance charges may mislead a customer into believing that there will be no rebate upon acceleration. Such a contractual provision, if supplied to a customer with rebate method disclosure required by § 226.8(b)(7) (e.g., as part of a combined note and disclosure form or where separate note and disclosure forms are presented to the customer simultaneously), would constitute additional information within the meaning of §226.6(c) of Regulation Z. If this additional information is misleading or confusing, or contradicts, obscures, or detracts attention from the required §226.8(b)(7) disclosure, there would be a violation of the regulation. Federal Reserve Board Staff Opinion Letter No. 1324, 5 Cons. Cred. Guide (CCH), paragraph 31, 827 (November 14, 1978).

The face of the Finance Company's contract states that upon prepayment the buyer will receive a rebate of the finance charge. The reverse of the document, which is part of the underlying contract, directly contradicts this statement by providing that upon early termination by acceleration the entire unpaid balance of the obligation is immediately due and payable. The contract provides that upon acceleration the consumer immediately becomes obligated to pay all amounts originally scheduled to become due, without benefit of any rebate of unearned finance charges.

The Finance Company has placed a disclosure on the back of the contract which directly contradicts a disclosure on the face of the contract and therefore has violated §226.6(c) of Regulation Z.

III.

THE FINANCE COMPANY'S ANALYSIS OF THE DISCLOSURE REQUIREMENTS OF REGULATION Z DEFEANTS THE PURPOSE OF THE TRUTH IN LENDING ACT.

A. The Finance Company Equates Meaningful Disclosure with Hidden, Unstated, Non-Binding Corporate Policy.

The Finance Company has responded to the allegations that it violated the provisions of §226.8(b)(7) and §226.6(c) of Regulation Z by arguing that its corporate policy, albeit a policy not disclosed in the contract, is to rebate finance charges upon acceleration in exactly the same manner as the method used for prepayment,

disclosed on the face of the contract. The apparent reasoning supporting this argument is that it would be redundant to have a separate disclosure of the rebate policy upon acceleration, since this policy is identical with that used for prepayment. In the context of the Finance Company's contract this argument must fail for a number of reasons.

1. Reliance on Undisclosed Corporate Policy is the Antithesis of Meaningful Disclosure.

The Finance Company's position is the antithesis of the purpose of the Truth in Lending Act. The Act reflects a transition in policy from one of *caveat emptor* to one of forcing the seller to disclose credit terms in the form of hard facts. *See Mourning v. Family Publications*, 411 US at 377. Under the provisions of the Truth in Lending Act, these hard facts are to be disclosed on the face of the contract or together in a separate disclosure statement. §226.8(a) of Regulation Z.

The Finance Company's assertion of corporate policy is directly contrary to these principles. The contract states unequivocably that upon acceleration the Finance Company has the right to declare all sums due or to become due under the contract to be immediately due and payable. There is no apparent room in this clause for rebate of any unearned finance charges, and a consumer who read this provision would reasonably understand that an obligor on the contract had no right to a rebate of finance charges upon acceleration.

2. Despite Alleged Undisclosed Corporate Policy, Oregon Law Allows the Finance Company to Retain Unearned Finance Charges Upon Acceleration.

Nothing in Oregon law appears to contradict the Finance Company's claim to all unearned Finance Charges upon acceleration. Respondents agree with the Government that it is unreasonable to attribute to the consumer a knowledge of state law.[20]

Even with a knowledge of state law, an Oregon consumer's understanding of the Finance Company's contract would be confirmed. ORS 83.620(1), which is part of the Oregon Motor Vehicle Sales Act, provides:

> Notwithstanding the provisions of a retail installment contract to the contrary, the buyer may pay in full at any time before maturity the obligation contained in the retail installment contract. Upon such premature prepayment, the buyer shall receive a refund credit. ORS 83.620(1) (Or. L. 1977).

ORS 83.660, a different section of the same Act, provides:

> *Acceleration Provision.* No provision in a retail installment contract by which, in the absence of the buyer's default, the holder may, arbitrarily and

[20]The Solicitor General in his brief at 28 properly criticized *Johnson v. McCrackin-Sturman Ford, Inc.*, 527 F.2d 257 (3d Cir. 1975), and *Price v. Franklin Investment Co., Inc.*, 574 F.2d 594 (D.C. Cir. 1978). Those cases hold that provisions of state statutes modify by operation of law the stated language of the Truth In Lending disclosures. Under those decisions, the borrower must become an expert in his or her state's consumer credit statutes to know what the contract really means. Nothing could be further from the intent of the Act.

> without reasonable cause, *accelerate the maturity* of any part or all of the time balance is enforceable. This section does not prohibit provisions in a retail installment contract accelerating any part or all of the time balance in the event of sale of transfer, or removal outside the state of the motor vehicle covered by the contract. (emphasis supplied) ORS 83.660 (Or. L. 1977).

When these two statutes are read in conjunction, it is clear that ORS 83.620(1) applies only to actual payment of the indebtedness before the scheduled date of maturity of the obligation. However, ORS 83.660 applies to an accelerated maturity caused by default, and does not provide for a finance charge rebate.[21]

[21]The Finance Company's statement in a footnote of its Petition for a Writ of Certiorari, page 13, that the word "maturity" as used in the section of the Oregon statute concerning prepayments (ORS 83.620) and the disclosure statement refers only to the originally scheduled date of maturity and not on accelerated maturity, is belied by ORS 83.660. Petitioners argument relies solely on an unexplained statement made by the Eighth Circuit which was not essential to its holding, which concerned Minnesota law and not Oregon law, and which appears to be erroneous upon a reading of the two Minnesota cases it cites in a footnote. *Griffith v. Superior Ford*, 577 F.2d 455, 460 (n.7) (8th Cir. 1978). The two Minnesota cases cited but not discussed by the Court both refer to an "acceleration of maturity."

Whatever the particulars of one state's laws, the general rule is that acceleration is an acceleration of maturity. In addition, *see*, e.g., Uniform Consumer Credit Code (1974 Act) §2.510, and state cases which speak of the "acceleration of the maturity" of a consumer credit obligation. *See*, e.g., Uniform Consumer Credit Code (1974 Act) §2.210(8) and 10 C.J.S. Bills & Notes §251(a) at 748, which states that:

> A note providing for the payment of the principal in installments at specified times, and requiring the payment of interest on each installment until maturity, does not require the payment of future unearned interest in the event *the maturity date is hastened by virtue of an acceleration clause* contained in the note. (emphasis added)

3. Reliance on Undisclosed, Non-Binding Corporate Policy Allows the Type of Consumer Abuse Intended to Be Prevented by the Truth in Lending Act.

The Finance Company would have the consumer disregard its written acceleration clause and somehow discern that upon acceleration the Finance Company would actually rebate a portion of the unearned finance charge by use of the sum of the digits method.[22] Adopting the reasoning of the Finance Company would entail the necessity for the consumer to discern and digest these different finance charge rebate policies: a policy disclosed on the face of the contract which by its terms is applicable only to actual prepayment; a written but apparently fictituous policy of non-rebate contained on the reverse of the contract and applicable in the event of acceleration; and an actual rebate policy for acceleration which is not disclosed anywhere in the contract unless the consumer assumes it is covered by the disclosed policy for prepayment.

This rebate policy confusion continued in the transaction entered into by Donna Eaton. Between the date

[22]At the time Mr. and Mrs. Milhollin entered into their contract, the Finance Company's apparent corporate policy was to rebate finance charges upon acceleration by use of the method disclosed on the front of the contract. This policy is evidenced by the affidavit of L. B. Plumber, the Finance Company's Portland, Oregon branch manager, submitted November 19, 1975 as part of the litigation in *Milhollin*.

> In the event Ford Motor Company decides to accelerate the balance owed as a result of the default of the contract purchaser, it always computed the interest rebate the same as it would compute it if the contract purchaser voluntarily prepaid the contract as set forth in Paragraph 14 of the face of the contract. (J.A. 22)

of the Milhollin's transaction in 1974 and the Eaton transaction in 1975 the Finance Company apparently altered its corporate rebate policy. Though the change was not relected anywhere in its contracts when Donna Eaton signed her contract on June 28, 1975, the actual policy of the Finance Company was to rebate finance charges upon acceleration only at the time of the payment of the accelerated balance.[23] As with the Company's prior policy, this policy is contrary to the written disclosure in the contract.

This form of meaningless disclosure is exactly the type of calculated ambiguity which the Truth in Lending Act was intended to remedy. An interpretation of the Truth in Lending Act which allows the creditor to disclose one policy while actually implementing another, would create the potential for the type of fraudulent creditor practices condemned by Chief Justice Burger in *Mourning v. Family Publications Service, Inc.*, 411 US 356, 363 (1972).

A creditor could orally inform a potential customer that upon acceleration the customer would receive a finance charge rebate or, as the Finance Company argues, assume that the customer will interpret the prepayment rebate policy on the face of the contract as also applying to the involuntary termination of the contract by acceleration. A customer might reasonably

[23]This policy is evidenced by the testimony of William Bellisario, another Portland, Oregon branch manager. It was submitted on May 24, 1977 as part of the testimony in the *Eaton* litigation.

> Whenever Ford Credit is prepaid, whether the prepayment is instigated by the customer or results from an acceleration by Ford Credit, the interest rebate is calculated and allowed in the exact same manner. (J.A. 68)

rely on this representation and enter into the contract, assuming that the credit policy was more liberal than that of a competitor which clearly disclosed an acceleration clause on the face of its contract. By making such a choice, the customer would be fulfilling the purpose of the Act. 15 U.S.C. §1601.

However, this choice might very well turn out to be meaningless. In the event of a subsequent default and acceleration, the customer would have no means by which to enforce the creditor's undisclosed policy of rebate. The only written contractual provision relating to acceleration appears on the reverse of the contract, and it does not provide for a rebate of finance charges. The undisclosed policy of the Finance Company would not prevent it from exercising the contract right to collect all unearned finance charges upon acceleration.[24]

[24]In *Hyland v. Oregon Agricultural Co.*, 225 P. 728 (Or. 1924) the Oregon Supreme Court Stated:

> 2. It is a substantive rule of law that as between the original parties to a contract and their privies, in the absence of fraud, mistake in fact or illegality in the subject matter of the contract, where the parties have entered into a contract which is complete in itself and which has been reduced to writing, it is "conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing"; and that parol evidence, that is, evidence extrinsic to the writing itself, is inadmissible for the purpose of adding to, subtracting from, altering, varying or contradicting the terms of the written contract or to control its legal operation or effect, and that all oral negotiations or stipulations between the parties preceding or accompanying the execution of the written contract are regarded as merged in it: 1 Greenl. Ev. (16 ed.), §275; *Looney v. Rankin*, 15 Or. 617 (16 Pac. 660); *Tallmadge v. Hooper*, 37 Or. 503 (61 Pac. 349, 1127); *Sutherlin v. Bloomer*, 50 Or. 398 (93 Pac. 135); *Gill v. Columbia Contract Co.*, 70 Or. 278 (141 Pac. 163); *Interior Warehouse Co. v. Dunn*, 80 Or. 528 (157 Pac. 806); *Wallace v. Oregon Engineering Co.*, 90 Or. 31 (174 Pac. 156, 175 Pac. 445). 225 P. at 729.

Moreover, should the Finance Company assign the contract to a collection agency or back to the dealer pursuant to their recourse arrangement, there is no guarantee that such an assignee would honor, or even be aware of the undisclosed rebate policy.[25]

The foregoing scenario is certainly not uncommon, and is an example of the type of fraudulent practices which motivated Congress to enact the Truth in Lending Act. As Chief Judge Pettine has explained:

[25]Such an awareness would be even more difficult to attain because of the "floating" nature of the Finance Company's undisclosed rebate policy. In 1969, prior to the effective date of the Truth in Lending Act, its contracts contained an acceleration clause virtually identical to the one in the present case, and the Finance Company argued that it was therefore entitled to retain all unearned finance charges. *Block v. Ford Motor Credit Company*, 286 A2d 228 (D.C. App. 1972).

However, in 1974 after the effective date of the Truth in Lending Act and after a Federal Reserve Board member had issued Letter No. 851, which equated acceleration with prepayment, the Finance Company developed an undisclosed rebate policy which reflected the Federal Reserve Board's position. Affidavit of L.B. Plumber. (J.A. 22). However, the written terms of the acceleration clause remained as they were in *Block*.

In 1977, after the Federal Reserve Board staff had issued Official Staff Interpretation No. FC-0054 which equated payment after acceleration with prepayment, the Finance Company's undisclosed policy had again changed to accord with the position of the Federal Reserve Board. Testimony of William Bellisario (J.A. 68). Again, however, the actual written terms of the acceleration clause did not change. To the extent the United States may suggest that there is no divergence between Finance Company's practice, as set forth in its employees' affidavits, and its contractual right to retain all unearned charges, the United States has obviously misread the record. Amicus Brief of United States, 5n2, 40n19.

> One of the purposes of the Truth in Lending Act is to inform the borrower of his or her potential liabilities in the event of default; that a creditor may have a policy of not imposing a delinquency charge does not excuse failure to disclose the ability to impose such a charge, or conversely to make an express disavowal of the right to collect it. Whatever the policy of the defendant might be, the fact remains that it is free by the terms of the loan contract to retain unearned interest after acceleration. What is important for the purposes of the Truth in Lending Act is the disclosure of charges the lender asserts a right to collect when he extends credit, not whether or not he actually asserts the right or can legally do so. *See Barnett v. Vernie Jones Ford*, 395 F. Supp. 904 (N.D. Ga. 1975), aff'd, 578 F.2d 1185 (5th Cir. 1978). *Tarplain v. Baker Ford, Inc.*, 466 F. Supp. 1340, 1346 (D. RI 1979).

The United States has adopted this reasoning in its Amicus Brief, stating:

> If the Creditor's policy is not to enforce certain of its contractual rights, that policy should likewise be subject to disclosure under the Act. Amicus Brief of United States, 30.

In accord with the provisions of the Truth in Lending Act, the pronouncements of the Federal Reserve Board, and the position of the Solicitor General, the judgment below should be affirmed.

IV.

THE PREPAYMENT REBATE DISCLOSURE ON THE FACE OF THE FINANCE COMPANY'S CONTRACT DID NOT PROVIDE THE CONSUMERS WITH MEANINGFUL INFORMATION REGARDING THE EFFECT OF ACCELERATION ON THE FINANCE CHARGE.

The United States agrees with the consumers that prepayment and acceleration each involve early termination of the contract and a subsequent, potential adjustment of the finance charge.

> Because the finance charge is included in the amount of the debt at the inception of the contract, exercise of either the creditor's right to accelerate or the debtor's right to prepay in full requires a determination of the amount owing at the time the right is exercised. Amicus Brief of United States, 10.

> While the right of acceleration need not be disclosed, the Board staff recognized that the process of acceleration may subject the borrower to additional costs that must be disclosed if the consumer is to be "given the information he needs to make the best informed decision on the use of credit." H.R. Rep. No. 1040, 90th Cong., 1st Sess. 13 (1967). Amicus Brief of United States, 12.

If the consumer is to make a meaningful and informed choice between several alternative credit plans, there must be a disclosure which is phrased in a manner which allows the consumer to understand the rebate policies for prepayment and acceleration, regardless of whether or not these policies are identical.

The Finance Company asserts that its disclosure of the rebate upon voluntary prepayment adequately disclosed its policy of rebate upon acceleration. However, the disclosure does not state, or even imply, that it applies to the process of acceleration as well as prepayment, and therefore is not in accord with the purpose of the Act to convey meaningful information to the consumer.

A. Acceleration and Prepayment Are Separate Concepts, Both Legally and In the Mind of the Average Consumer.

The question in regard to the Finance Company's contract is whether or not the prepayment disclosure is clear enough to convey an understanding of the effect of acceleration on unearned finance charges to the average, credit-ignorant consumer whom the Act was intended to protect.[26] See *Mourning v. Family Publications*, 411 US at 363.

The applicable words in the Finance Company's disclosure are:

> Buyer may prepay his obligations under this contract prior to maturity of the final installment hereunder, . . . (J.A. 9, 65).

[26]With consumer protection legislation, it must be remembered that:

> [T]he law is not made for the protection of experts, but for the public—that vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze, but are governed by appearances and general impressions. *Spradling v. Williams*, 566 SW 2d 561, 563, (Tex. 1978). *Accord: Stork Restaurant v. Sakati*, 166 F.2d 348, 359 (9th Cir. 1948).

The first significant word which the customer reads is the term "prepay," which connotes an early payment, one made before a scheduled due date.[27] When this word is preceeded by the term "may," the combination clearly implies an optional, early payment. This is contrasted to the concept of acceleration, which is never voluntary, and which means an involuntary maturation of a due date sooner than expected.

The disclosure further indicates that the customer may prepay the contractual obligation "prior to maturity of the final installment hereunder." A consumer may assume that upon acceleration of the indebtedness the right to prepay, and consequently to receive a finance charge rebate, is forfeited since the due dates of all the installments, including the final payment, have been accelerated.

This realization has a legal basis. Acceleration by its very nature permits the creditor to mature the entire debt at once to facilitate an immediate resolution of the whole contract. This avoids the burden of either seeking remedies on each installment as they separately become due or waiting until the last scheduled installment is past due.

When the creditor accelerates the balance of the

[27]Webster's Seventh New Collegiate Dictionary defines "prepay" as: "to pay or pay the charge in advance." On the other hand, the term "accelerate: is defined as: "1: to bring about at an earlier point of time, 2: to add to the speed of, 3: to hasten the ordinary progress or development." (1972 ed.)

contract, there is no longer a future maturity date.[28] By the terms of the Finance Company's prepayment disclosure, upon acceleration the customer loses the right to prepay, and therefore the right to receive a finance charge rebate.

It is unrealistic to assume that the average consumer will be able to discern that prepayment is the equivalent of acceleration for the purposes of the finance charge rebate. The necessity for this assumption, created by the staff letters of the Federal Reserve Board, is avoided by the Ninth Circuit rule which provides the consumer with a clear disclosure of the separate rebate methods.

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[28]It is a generally accepted rule of state law that when a creditor declares the contract balance due and payable that that act accelerates the "maturity" of the obligation. Since maturity has already occurred, "prepayment" can no longer be made before "maturity."

> "Stipulations such as are contained in acceleration clauses providing that upon default of the payer the payee at his option may declare the entire amount of the note due and payable are not regarded as in the nature of a penalty or forfeiture and are therefore not viewed with disfavor by the courts. They are considered as agreements between the parties for bringing the notes to an earlier maturity than by the terms of the instrument otherwise provided." *Reid v. Wentworth and Irwin*, 63 P2d 210, 212, (Or. 1937).

See Stewart v. Casey, 595 P.2d 1176, 1179 (Mont. 1979); *Empire Trust Co. v. Equitable Office Bldg. Corp.*, 167 F.2d 346 (2nd Cir. 1948); *Walter E. Heller & Co. v. Mall, Inc.*, 267 F. Supp. 343 (E.D. La. 1967); *Genn v. CIT Corp.*, 392 A.2d 1135 (Md. Ct. Spec. App. 1978). See also Uniform Consumer Credit Code §§2.510, 2.210(8), 3.210(8); 10 C.J.S. Bills & Notes §251(a) at 748.

V.

THE DECISION AND ANALYSIS OF THE COURT BELOW IS IN ACCORD WITH THE PRINCIPLES OF THE TRUTH IN LENDING ACT.

The Court below held that the Finance Company was liable to the Consumers for failure to disclose in the face of the contract an acceleration clause and its effect on the rebate of unearned interest. This ruling was based on the court's previous holding in *St. Germaine v. Bank of Hawaii*, 573 F.2d 572 (9th Cir. 1977), in which the Court ruled:

> When we equate acceleration with prepayment, the disclosure obligation under §226.8(b)(7) is evident: The creditor must disclose whether a rebate of unearned interest will be made upon acceleration and also disclose the method by which the amount of unearned interest will be computed if the debt is accelerated. 573 F.2d at 577.

Contrary to the assertion of the Finance Company this ruling is in accord with the basic principles enunciated by the Federal Reserve Board staff Letters. Both the Ninth Circuit and the staff letters equate acceleration with prepayment, recognize that each event causes an early termination of the contract, and provide that the resulting potential for adjustment of the finance charge is information which is important for the consumer to understand and therefore must be included in the disclosure obligation of §226.8(b)(7). The position of the Respondents is that the Act has been violated by the Finance Company and that the judgment below can be sustained under either the analysis of the Ninth Circuit as set forth in *St. Germaine*, or

under the basic premises of the Federal Reserve Board staff letters.

However, the decision of the Ninth Circuit, unlike the staff letters, provides for a disclosure rule which in all aspects of its application is always in accord with the purposes of the Truth in Lending Act. The analysis contained in the letters issued by the staff of the Federal Reserve Board breaks down in its application of general Truth in Lending principles to particular circumstances, thereby failing to provide useful and meaningful information to consumers. The lower Court avoided these inconsistencies in the staff letters by realizing that the adequacy of a disclosure can only be judged in reference to the clarity of the information which it provides to the consumer. It is the consumer who must receive a "meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and thereby avoid the uninformed use of credit." 15 USC §1601.

A. The Rule of the Ninth Circuit Guarantees that the Creditor Will Consistently Disclose Meaningful Information Regarding Finance Charge Rebates.

The Federal Reserve Board staff initially equated the concept of prepayment with that of acceleration, and by adopting this analysis for the purposes of disclosure under §226.8(b)(7), the Ninth Circuit has developed a rule which results in consistently meaningful disclosure when applied to any of the contract situations addressed by the letters of the Federal Reserve Board staff. This rule is simple and uniform; the creditor must

always disclose whether or not a finance charge rebate will be made upon acceleration in conjunction with an identification of the method of computing that rebate.

The rule encompasses all of the various creditor rebate policies, whether they are simple or intricate, in accord with state law, or identical with that for prepayment. Whatever the nature of the policy, it must be clearly disclosed in reference to acceleration.

Unlike certain portions of the Federal Reserve Board staff letters, application of this rule will never result in a situation where the consumer must predicate meaningfulness of disclosure upon reliance on the undisclosed rebate policy of the creditor, or familarity with the various and often intricate state consumer credit statutes. The consumer will always be able to rely on a clear contractural disclosure as to those circumstances which will affect the finance charge and will never have to approach a contract with a pen in one hand and a volume of state statutes in the other.

Most significant of all of the benefits of the Ninth Circuit rule is that it does not require the consumer to guess that the term "prepayment" is equated with "acceleration." The rule guarantees to the consumer enough information to clearly understand that there are two concepts involved with the rebate of finance charges, a rebate which may result from prepayment and one which may result from acceleration. By requiring the disclosure of the concept of acceleration in connection with the method for rebates, the Court is supplying the consumer with the necessary referent to insure a consistently meaningful disclosure. E.g., *Bone v. Hibernia Bank,* 493 F.2d 135, 138 (9th Cir. 1974).

The Solicitor General has criticized this approach as

necessitating redundant disclosures when the rebates are identical for prepayment and acceleration. Amicus Brief of United States, 27. Such a redundancy is not an unavoidable consequence of the Ninth Circuit's rule. If a creditor's rebate policies are identical for prepayment and acceleration, a creditor might simply disclose as follows:

> In the event of prepayment in full or acceleration of the obligation, Buyer shall receive a rebate of the unearned portion of the finance charge computed under the sum of the digits method.

Such a disclosure is not redundant, but rather is simple, clear and provides the consumer with meaningful information. If the creditor's rebate policies are different, then the creditor would have to disclose one policy for prepayment and one for acceleration. By their very natures such disclosures would not be redundant. *See* Staff Opinion Letter No. 851.

B. The Pronouncements of the Federal Reserve Board Staff Do Not Consistently Provide For A Meaningful Disclosure Regarding Finance Charge Rebates.

The Federal Reserve Board Staff has approached the acceleration disclosure problem through the context of §226.8(b)(4) of Regulation Z. This regulation provides:

> (b) In any transaction subject to this section, the following items, as applicable, shall be disclosed:
>
> . . .

> (4) The amount, or method of computing the amount, of any default, delinquency or other charges payable in the event of late payments.

The position of the Federal Reserve Board staff is that if a creditor rebates unearned finance charges upon prepayment by one policy, but uses a different policy to rebate finance charges upon payment after acceleration, the difference is a charge to the customer which must be disclosed under §226.8(b)(4). If the rebates under the two policies are the same then there is no charge to the customer and no requirement to disclose a default charge pursuant to §226.8(b)(4) or to mention on the disclosure statement the fact of acceleration and its effect on the finance charge. *See* Staff Opinion Letters No.'s 851, 1208.

This approach, however, generates several obstacles to guaranteeing that in all circumstances the consumer will receive a meaningful disclosure. The first obstacle is that if the creditor's rebate methods for acceleration and prepayment are identical, the contract will not contain a separate disclosure as to charges resulting from acceleration. Consequently, by reading the face of the contract the consumer will be able to gather information from only one disclosure which concerns finance charge rebates. By its terms, however, this disclosure would appear to apply only to rebates upon prepayment.

The meaningfulness of this disclosure is therefore dependent upon the unrealistic assumption that the average consumer will be able to equate prepayment with the concept of acceleration for it is only by making this connection that the consumer will be able to clearly understand that upon termination of the

contract by acceleration there may be a rebate of unearned finance charges. However, the average consumer will not equate the voluntary act of prepayment with the involuntary acceleration of the maturity date of the contract. *See* Section IV, *supra.*

This approach by the staff of the Federal Reserve Board also hinders the ability of the consumer to meaningfully compare the terms of the various available credit plans. The staff letters indicate that if the creditor rebates finance charges upon acceleration by a method different from that disclosed for prepayment the resulting rebate difference is a charge which must be disclosed with the delinquency charges in the face of the contract. However, if two individual creditors each rebate finance charges upon acceleration by the same method, but differ as to the method to be used for prepayment such that the first creditor rebates on prepayment by the same method as used for acceleration, and the second creditor by a method different than used for acceleration, the consumer will be faced with conflicting disclosures.

In the first contract the consumer will find the charges relating to acceleration disclosed with the delinquency charges on the face of the contract. In the second contract, *even though the creditor uses the same rebate method for acceleration as the first creditor*, the consumer will find no disclosure of charges upon acceleration and no mention on the face of the contract of the process of acceleration.

One of the purposes of the Truth in Lending Act is to guarantee meaningful disclosure such that the consumer "will be able to compare more readily the

various credit terms available to him and avoid the uninformed use of credit." 15 USC §1601(a). In the foregoing situation the consumer would not be able to meaningfully compare the two credit plans, and this approach by the Federal Reserve Board staff is not in accord with the purpose of the Act.

A third obstacle to the meaningful application of the statements of the Federal Reserve Board staff concerns the change in approach to the circumstances creating a finance charge rebate. In Staff Opinion Letter No. 851 the staff equated prepayment with the act of acceleration. However, in the later Official Interpretation No. FC-0054 the approach was to equate prepayment with *payment* after acceleration. When the later staff of the Federal Reserve Board altered their approach they did not define what constitutes payment after acceleration, consequently leaving that definition to the descretion of the creditor and the provisions of the various state consumer credit statutes. Even more significantly, however, with the change in approach the Board's staff pinpointed the time for comparison of rebate methods for prepayment and acceleration as that time when payment after acceleration occurs.

There are several problems with this approach. First, each individual creditor may have a different policy as to when it considers payment to have occurred. Payment could occur upon the securing of a judgment against the customer, or upon execution of the judgment, or upon the decision to retain a repossessed automobile in satisfaction of the indebtedness. Consequently, there could be as many different disclosure rules as there are creditor definitions of payment. None of these various definitions would have to be disclosed

on the face of the contract.[29]

Second, there is considerable variation among the states as to when a finance charge rebate must be made upon acceleration. *See* Appendix A.[30] The approach of the Federal Reserve Board staff does not accommodate these various options, and hinders the ability to have a meaningful disclosure.

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[29]State law may well serve to intensify this confusion. ORS 83.830(1)(a) provides:

> (1) Notwithstanding any other provision of law:
>
> (a) If the buyer defaults in the performance of a retail installment contract or retail charge agreement subject to ORS 83.010 to 83.190 or 83.510 to 83.680 which is for the sale of consumer goods or motor vehicles, and if the seller repossesses or voluntarily accepts surrender of the goods or motor vehicles, and if at the time of default the unpaid time balance or time sale price is less than $1,250, the buyer shall not be personally liable to the seller for any deficiency between the amount of his unpaid obligation and the amount realized by the seller on resale or other disposition of the goods or motor vehicles. (ORS 83.830(1)(a)) (Or. L. 1973).

Even though the creditor may not have received repayment of the full price of the automobile, the customer is not liable to the creditor for any further sums. Can the customer claim that payment after acceleration has been made?

[30]ORS 82.010(1)(a) provides that after acceleration interest may continue to accrue on the unpaid balance.

> (1) The legal rate of interest is nine percent per annum and is payable in:
>
> (a) All moneys after the become due; (ORS 82.010(1)(a) (Or. L. 1979).

Depending upon when payment after acceleration occurs, this accruing interest would continue to increase the amount of the unpaid balance.

C. The Analysis of the Ninth Circuit Promotes the Truth in Lending Act Goals of Clarity of Disclosure and Uniformity of Application.

The significant differences between the rule of the Ninth Circuit and the statements of the Federal Reserve Board staff are basically ones of clarity, notice and uniformity of application. The staff letters require separate disclosure of rebate methods only if the rebate method upon payment after acceleration is different from that disclosed for prepayment. In all other cases, the face of the contract or a disclosure statement will not contain any reference to acceleration or the effect of acceleration on the finance charge.

Where the consumer finds a contract silent in its face as to acceleration, there are several options available to determine whether there will be a rebate of finance charges upon acceleration. The nature of these options illustrate the significant differences between the approach of the Federal Reserve Board staff and the rule of the Ninth Circuit.

A consumer who looks to the underlying contract may find one of a number of types of acceleration clauses. In the instant case, the Respondents would have found a clause which clearly and unambiguously granted the Finance Company the right to retain all unearned finance charges upon acceleration. However, this clause is directly contrary to any rebate method disclosed on the front of the contract. This contradiction violates §226.6(c) of Regulation Z, which prohibits the inclusion in a contract of additional contradictory information.

A consumer who reads the underlying contract may also find a clause which grants the creditor the right to accelerate the balance of the contract and implies that there will be no rebate of unearned finance charges upon acceleration. This clause would mislead and confuse the consumer in violation of §226.6(c) of Regulation Z when read in conjunction with the disclosures on the front of the contract. *See* Staff Opinion Letter No. 1324.

Finally, a customer might find a clause which allows the creditor to accelerate the balance of the contract and which also provides for a rebate of unearned interest, but which is silent as to the method of computing the unearned interest. A typical example of this clause is "seller shall have the right to declare all amounts due hereunder to be payable and in this event Buyer shall receive a rebate of unearned finance charges."

In this situation the staff of the Federal Reserve Board suggests that the customer has two available options to determine how to ascertain the rebate. First, the staff suggested that undisclosed creditor rebate policy might explain the disclosure. *See* Staff Opinion Letter No. 1208. However, not only is it unrealistic to assume that the customer will have access to this undisclosed policy, but this approach also forces the consumer to rely upon the good faith of the creditor in actually exercising the undisclosed policy. *See* section III of this brief. The consumer needs to know what rebate method the creditor actually has under the contract, not what rebate policy the creditor may or may not exercise. See *McDaniel v. Fulton National*

Bank, 576 F.2d 1156 (5th Cir. 1978).[31]

Finally, another staff letter suggests that state law will tell the consumer what rebate method the creditor must use. *See* Staff Opinion Letter No. 1324. However, forcing the consumer to interpret the contract through a familiarity with state law frustrates the purpose of the Act to provide meaningful disclosures. 15 USC §1601. Also, there are numerous variations among the states in regard to rebates upon acceleration, and in some states the issue of the right to a finance charge rebate upon acceleration has been resolved. See Appendix A.

The rule of the Ninth Circuit is clear; it requires the creditor to disclose on the front of the contract whether a rebate of unearned finance charges will be made upon acceleration and the method by which the rebate will be made. This disclosure provides the consumer with all of the necessary information, and does not force the consumer to look elsewhere to find the information necessary to understand the effect of acceleration upon the finance charge.

VI.

THE APPROACH OF THE STAFF OF THE FEDERAL RESERVE BOARD FRUSTRATES AN IMPORTANT ENFORCEMENT MECHANISM OF THE TRUTH IN LENDING ACT.

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[31]The Fifth Circuit clearly held that the creditor must disclose the contractual right to retain unearned interest upon acceleration. The Solicitor General has criticized this opinion for stating that the disclosure is required without a further disclosure of creditor policy. Amicus Brief of United States, 29.

The approach in the Federal Reserve Board staff letters suggests that the rebate method for acceleration may be hidden within the disclosure concerning prepayment, and thereby frustrates the private enforcement of the Act. When Congress enacted the Truth in Lending Act it was with the intent of assuring enforcement by creating private attorneys general out of consumers.

The Act encourages consumers to enforce its provisions by providing minimum damages to the successful litigant, as long as the consumer institutes an action within one year of the date the transaction is consummated.[32] *See Ratner v. Chemical Bank New York Trust Company*, 329 F. Supp. 270, 280-281 (S.D.N.Y. 1971);

[32] § 130(a) of the Act, 15 USC § 1640(a) provides:

(a) Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this chapter or chapter 4 or 5 of this title with respect to any person is liable to such person in an amount equal to the sum of–

(1) any actual damage sustained by such person as a result of the failure;

(2) (A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, or (ii) in the case of an individual action relating to a consumer lease under chapter 5 of this title, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000; or

(B) in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery in such action shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the creditor; and

(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court.

Ives v. W. T. Grant Company, 522 F.2d 749, 756 (2nd Cir. 1975); *White v. Arlen Realty and Development Corp.*, 540 F.2d 645, 649 (4th Cir. 1975); *Hannon v. Security National Bank*, 537 F.2d 327, 328 (9th Cir. 1976).

The policy of the Federal Reserve Board's staff potentially frustrates this enforcement mechanism. Under the provisions of Staff Opinion Letter No. 1208, the existence of a disclosure violation is contingent upon whether in fact the creditor rebates upon payment after acceleration in accord with the method disclosed for voluntary prepayment. In most situations, this "fact" of method of rebate will not be determined until there is a default under the contract by the customer and a subsequent acceleration by the creditor.

If this default occurs later than one year from the date the contract was executed, the consumer is no longer protected by the Act. Because the disclosure may contain no explicit statement regarding the consumers right to a rebate upon acceleration, even where the contract contains an acceleration clause, the creditor may decide not to rebate any finance charges to the customer. Regardless of what the consumer may have been led to believe concerning rebate, if there is an acceleration, the consumer has no remedy under the Truth in Lending Act since the one year statute of limitations has expired.

The Federal Reserve Board's staff letters appear to assume that until the creditor's actions indicate otherwise, the prepayment disclosure also reflects the creditor's method for rebates upon acceleration. When this assumption is analyzed in connection with the one year statute of limitations, it is clear that a change in the

creditor's non-binding rebate methods can frustrate an important enforcement mechanism established by Congress.

The Ninth Circuit's rule of disclosure avoids these problems of hidden and changing credit terms by simply requiring prior disclosure of whether and how the creditor will rebate unearned finance charges if there is an acceleration.

VII.

THESE PORTIONS OF THE PRONOUNCEMENTS BY THE FEDERAL RESERVE BOARD STAFF WHICH ARE NOT IN ACCORD WITH THE PRINCIPLES OF THE TRUTH IN LENDING ACT SHOULD NOT BE ACCORDED DEFERENCE BY THE COURT.

The Respondents recognize that when the construction of an administrative regulation is in issue, great deference is due to the promulgating agency's own construction. *Udall v. Tallman*, 380 US 1, 16 (1965). However, in the case before this Court all of the pronouncements regarding acceleration have come from the staff of the Federal Reserve Board, rather than the Board itself. Respondents also note that the degree of deference "in a particular case will depend on the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if not control". *Skidmore v. Swift & Co.*, 323 US 134, 140 (1944); *see also Bone v. Hibernia Bank*, 493 F.2d 135 (9th Cir. 1974).

The Federal Reserve Board Staff has adopted an approach to the question of disclosure of finance charge rebates which is in accord with the principles of Truth in Lending. The Board's staff agrees that the effect of acceleration on the finance charge is important information to be disclosed to the consumer. Such a position is in accord with the purpose of the Act that the "informed use of credit results from an awareness of the cost thereof by consumers," and this position should be adopted. 15 USC §1601(a).

However, certain of the Board's statements concerning the circumstances under which a specific disclosure must be made of the effect of acceleration on the finance charge do not fulfill the purpose of the Act of "assur(ing) a meaningful disclosure of credit terms." 15 USC §1601(a).

These statements, particularly those the application of which would require the consumer to equate prepayment with acceleration in order to obtain meaningful information from the contract, do not evidence the requisite thoroughness of consideration to be accorded deference by the Court.

CONCLUSION

It is clear that under the principles of the Truth in Lending Act and the specific disclosure requirements of Regulation Z that the effect on the finance charge as a result of the process of acceleration should be disclosed to the consumer. It is also clear that under either certain of the pronouncements of the Federal Reserve Board staff or the opinion below, the Finance Company

has violated the provisions of Regulation Z in regard to the Respondents, and therefore the judgment below should be affirmed.

However, while the basic approach of the Federal Reserve Board Staff is in accord with the principle that the effect on the finance charge of acceleration is important information to be disclosed to the consumer, in certain significant respects the Board's position fails to guarantee consistently meaningful disclosures of this information to the consumer. The approach by the Ninth Circuit avoids this problem, and the judgment below should be affirmed based on the analysis of the Court below and *St. Germaine v. Bank of Hawaii*, 573 F.2d 572 (9th Cir. 1977).

Respectfully submitted

RICHARD A. SLOTTEE
Counsel for Respondents

APPENDIX A

STATE STATUTORY AND CASE LAW CONCERNING REBATE OF UNEARNED FINANCE CHARGES FOLLOWING DEFAULT*

The following statutes and cases require that a rebate of unearned finance charges be made as of the date of acceleration:

Iowa	Consumer Credit Code §2.510(6)
Pennsylvania	69 P.S. §622(b) (date of "liquidation")**
Wisconsin	Banking §76.01(2) (date of "liquidation")**

Walter E. Heller & Co. v. Mall, Inc., 267 F. Supp. 343 (E.D. La. 1967)

Credit Alliance Corp. v. Adams Construction Corp., 570 S.W.2d 283 (Ky. 1978)**

*A few states–for example, California, Louisiana, New York, Wisconsin–have passed more than one statute on the question of rebating unearned finance charges following default, each dealing with particular types of transactions (e.g., motor vehicle installment sales, all other retail installment sales). When such statutes utilize different dates for determining the rebate, they are listed separately, under their appropriate paragraph heading.

Discrepancies between a state's statute(s) and its case law are usually due to the fact that the case predates the statute, and occasionally the result of the court's misreading of the statute.

Individual variations from a paragraph heading are noted in parentheses following the citation.

**The correct interpretation of these statutes/cases is open to question.

Associates Discount Corp. v. Solar, 209 S.2d 127 (La. App. 1968)

Berger v. DeSalvo, 156 So.2d 323 (La. App. 1963), *cert. denied*, 157 S.2d 231 (La. 1963)

Genn v. CIT Corp., 392 A.2d 1135 (Md. Ct. Spec. App. 1978)

Spiotta v. William H. Wilson, Inc., 179 A.2d 49 (N.J. 1962) (date of "default")

Grissom v. Dye, 269 P.2d 367 (Okla. 1953)

Garland v. Union Trust Co., 165 P. 197 (Okla. 1917)**

Moore v. Sabine National Bank of Port Arthur, 527 S.W.2d 209 (Tex. Civ. App. 1975) (date of accelerated "maturity")

The following statutes require that a rebate of unearned finance charges be made as of the date of acceleration *or* repayment:

New York	Personal Property Law Art. 9 §305(3); Art. 10 §408(6)

The following cases require that a rebate of unearned finance charges be made as of the date of acceleration *and* payment:

Dartmouth Plan, Inc. v. Landkammer, 82 Misc.2d 71 (N.Y. 1975)

Berman v. Schwartz, 59 Misc.2d 184 (N.Y. 1968)

Tobin v. Holmboe, 45 P.2d 716 (Okla. 1935)**

The following statutes and cases require that a rebate of unearned finance charges be made as of the date the creditor files suit:

Louisiana	Consumer Credit Law §6:958C; §9:3529
South Dakota	S.D. C.L. §54-3A-10

Chapman v. Capri Construction Co., 248 So.2d 101 (La. App. 1971)

New Jersey Mortgage and Investment Corp. v. Young, 341 A.2d 360 (N.J. 1975)

Chavez v. Aetna Finance Co., 553 S.W.2d 174 (Tex. Civ. App. 1977), *aff'd*, 561 S.W.2d 799 (Tex. 1978)

The following statutes require that a rebate of unearned finance charges be made as of a date dependent on whether the creditor repossessed or resold the collateral, or the date of judgment:

California	Civil Code §1806.3(b) (the date the creditor takes possession of the collateral or the date of judgment); §2982(d) (15 days after the surrender or repossession and disposition of the motor vehicle)
North Carolina	G.S. N.C. §25A-32 (date of judgment or 15 days after repossession)

The following statutes and cases require that a rebate of unearned finance charges be made as of the date of judgment:

Colorado	UCCC §2.210(8); §3.210(8)
Hawaii	§408-15(f) H.R.S. (date of payment judgment)
Idaho	UCCC §2.210(8); §3.210(8)

IN THE

Supreme Court of the United States

October Term, 1979

No. 78-1487

Ford Motor Credit Company, et al.
Petitioners,

vs.

Dennis Milhollin, et al.
Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CONSUMER BANKERS ASSOCIATION AS AMICUS CURIAE

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BRIEF OF THE CONSUMER BANKERS ASSOCIATION AS AMICUS CURIAE

The Consumer Bankers Association respectfully submits this Brief as *amicus curiae* in support of the Petitioners, filed upon the written consent of all parties in accordance with Rule 42(2) of the Rules of this Court.*

INTEREST OF AMICUS CURIAE

The Consumer Bankers Association (hereinafter "The Association") is a non-profit organization organized in

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* Written consent from counsel for each party has been filed with the Clerk of this Court.

October 1919 to provide a voice for the consumer banking industry. Since that time, the membership of The Association has grown to over 330 commercial banks of all sizes, each actively engaged in extending consumer credit. The members of The Association presently hold obligations representing over $72 billion of consumer credit, more than 55 percent of all consumer credit extended by commercial banks.

Members of The Association engage in a great volume of consumer credit transactions, all of which are subject to the extensive technical requirements of the Truth in Lending Act. Each member is charged by federal law with providing a comprehensive set of credit cost disclosures in connection with each credit transaction. In the case of many members, this applies to hundreds of different transactions each day.

Discharging this responsibility has been rendered virtually impossible by the thousands of court decisions that have applied, limited, reversed or otherwise affected requirements under the Truth in Lending Act. The chaos now characterizing consumer credit regulation results in extensive costs to banks in preparing, revising, printing, reprinting, distributing and redistributing forms and in training and retraining bank personnel in their use.

Only through the judicial recognition and adoption of a single method for imposing requirements under the Truth in Lending Act—a role delegated by Congress to the Board of Governors of the Federal Reserve System—will it be possible to bring order and certainty to this area. The Association's members are vitally interested in having this Court acknowledge the proper role of the Board and thereby end the waste of judicial and economic resources

caused by inconsistent judicial interpretations of hypertechnical requirements of the Truth in Lending Act.

SUMMARY OF ARGUMENT

The recent proliferation of consumer credit has been accompanied by the creation of a complex federal regulatory mechanism that establishes technical requirements in connection with consumer credit cost disclosures.

Since 1969, when the Truth in Lending Act became effective, the technical and often nonsubstantive requirements of the Act have been applied in more than 14,000 lawsuits that have produced an astounding array of inconsistent determinations. The inconsistencies resulting from court interpretations have made uniform national disclosures impossible and created untold creditor frustration in attempting to comply with often contradictory requirements. Moreover, these inconsistencies generate consumer confusion because the massive number of judicial interpretations virtually assures that consumers will not receive identical, and thus comparable, credit cost information.

In attempting to achieve the simple but elusive Congressional objective of providing uniform and meaningful credit cost disclosures, the Act has become a magnet for lawsuits due to judicial interpretations that are virtually limitless in their variations. The technical nature of the Act's requirements and the literally thousands of judicial decisions that attempt to interpret and apply them have subverted the Act's objective of uniform credit cost disclosure. The result is to convert the Act into a universal option to bring lawsuits for grievances wholly unrelated to credit cost disclosure. This inappropriate use of the Act offends public policy and results in increased costs of credit that must be borne by all borrowers.

Judicial deference to the pronouncements of the Board of Governors of the Federal Reserve System would provide order and certainty to this area. Notwithstanding this Court's decision in *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356 (1973), and an unmistakable Congressional intent that Board pronouncements should be binding, some courts have merely paid lip service or have rejected them altogether.

In this complex area there must be clear and consistent rules on which both creditors and consumers can rely. In most instances, the existence of a single reliable rule is considerably more important than the substance of that rule. Only the Board, as the administrative agency charged by Congress with implementing the Act, can provide certainty by fashioning a comprehensive rule that recognizes the widely diverse national credit industry.

Although the Board has attempted to bring order to federal disclosure requirements, it has been rebuffed by the courts. Despite this Court's clear expression in *Mourning*, the refusal of many courts to show any real deference to Board pronouncements and, in many cases, their outright rejection of them, have resulted in an understandable reluctance on the part of the Board to exercise its authority. This Court should encourage the Board to resolve the numerous inconsistencies that have arisen by admonishing the courts to follow its official Board pronouncements unless they are plainly erroneous. Slightly less authoritative unofficial rulings should be accorded great deference. Only through a clearly enunciated rule that the Board—not courts throughout the country—is to implement the highly technical requirements of the Truth in Lending Act will there be uniformity and order in federal credit disclosure regulation.

ARGUMENT

I. THE ACT IMPOSES DETAILED CREDIT COST DISCLOSURE REQUIREMENTS AND IS TO BE IMPLEMENTED THROUGH A CAREFULLY FASHIONED ADMINISTRATIVE INTERPRETATIVE STRUCTURE

A. The Statutory Purpose And Scheme

A substantial increase in the availability and use of consumer credit, combined with concerns about the lack of consumer awareness about credit costs, produced the Truth in Lending Act (hereinafter the "Act"), which became effective on July 1, 1969.[1] As observed by this Court in 1973:

> By [1968], it had become abundantly clear that the use of consumer credit was expanding at an extremely rapid rate. From the end of World War II through 1967, the amount of such credit outstanding had increased from \$5.6 billion to \$95.9 billion, a rate of growth more than 4½ times as great as that of the economy.

Mourning v. Family Publications Service, Inc., 411 U.S. 356, 363 (1973). Since that time, there has been an even more rapid acceleration of the trend noted by the Court. As consumer goods consumption has increased and the social stigma against incurring debt has eased, consumer credit has increased to \$287.6 billion as of May 31, 1979,[2] an amount three times larger than the \$95.9 billion cited by the Court for 1967. As a result, a commercial activity once

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[1] Truth in Lending Act, Pub. L. No. 90-321, Title I, 82 Stat. 146 (1968).

[2] 65 *Federal Reserve Board Bulletin* (1979), tables 1.54, 1.55, pp. A41, A42 (updated by "Federal Reserve statistical release" dated July 6, 1979).

limited in both scope and constituency is now of concern and interest to all consumers.

The principal purposes of the Act are to provide meaningful and comparable credit cost information, to foster increased consumer awareness of the cost of credit, and to facilitate shopping among various credit sources.[3] Virtually all credit transactions entered into by individuals for personal, family or household purposes are covered. These transactions range from small personal, unsecured loans to long-term mortgage loans involving hundreds of thousands of dollars.

Recognizing the diversity of the credit market and its continuing evolution, Congress in the words of this Court "determined to lay the structure of the Act broadly."[4] It delegated to the Board of Governors of the Federal Reserve System (hereinafter the "Board") the task of implementing the Act through its regulatory pronouncements.[5]

> The Board shall prescribe regulations to carry out the purposes of this [Act]. These regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this [Act], to prevent circumvention or evasion thereof, or to facilitate compliance therewith.[6]

As a method of enforcing compliance with this regulatory scheme, the Act provides an express civil remedy for

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[3] 15 U.S.C. § 1601.
[4] *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 365 (1973).
[5] *Id. See also* 15 U.S.C. § 1604.
[6] 15 U.S.C. § 1604.

any violation of any provision of the Act or regulations. This remedy imposes liability upon a creditor without regard to the severity or significance of the violation, and irrespective of whether there was any damage or injury to the consumer. In effect, every violation, however hypertechnical, is treated for statutory damage purposes in precisely the same manner as a major substantive violation. Each violation results in liability for statutory damages equal to two times the finance charge, but not less than \$100 or more than \$1000.[7] Most significantly, the consumer litigant recovers his costs and attorney's fees.[8]

B. The Administrative Response: Regulations, Official Board Interpretations, And Official And Unofficial Staff Interpretations

Recognizing that the consumer credit industry is diverse and rapidly changing, Congress constructed a multi-leveled regulatory framework to provide the technical disclosure details that it could not possibly include in the statute. The structure consists of four components.

1. *Regulation Z*

Most notable among the Board's responses was Regulation Z, which filled many of the interstices of the Act by creating a compliance scheme of detailed disclosure requirements for consumer credit transactions.[9]

2. *Other Board Pronouncements*

To supplement the guidance provided by the Act and Regulation Z, Congress has provided other sources of interpretations upon which creditors can rely. Regulation Z has

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[7] 15 U.S.C. § 1640(a)(2)(A)(i).
[8] 15 U.S.C. § 1640(a)(3).
[9] 12 C.F.R. Part 226.

been amended to provide a mechanism for issuing these interpretations and to implement certain amendments to the Act, discussed below.[10] Among these are procedures for issuance of interpretations and the designation of officials "duly authorized" to issue interpretations of Regulation Z.[11] In 1976, the Board amended Regulation Z to establish three categories of regulatory interpretations: "Official Board Interpretations," "Official Staff Interpretations" and "Unofficial Staff Interpretations."[12]

(a) *Official Board Interpretations*

Under procedures established by the Board, the type of interpretation to be issued by the Board or designated officials turns on specifically enumerated criteria. Official Board Interpretations are to be issued "only on potentially

[10] 40 *Fed. Reg.* 30085 (July 17, 1975) (amended 12 C.F.R. § 226.1(c) by inserting a provision, referring to a creditor's defense to civil liability for good faith compliance with Regulation Z and Board Interpretations, to implement Title IV of Pub. L. No. 93-495, 88 Stat. 1518 (Oct. 28, 1974)).

41 *Fed. Reg.* 28255 (July 9, 1976) (amended 12 C.F.R. § 226.1(c) by inserting a provision, referring to a creditor's defense to civil liability for good faith compliance with an Interpretation or approval issued by a duly authorized official or employee of the Board, to implement § 3(b) of Pub. L. No. 94-222, 90 Stat. 197 (Feb. 27, 1976); also inserted 12 C.F.R. § 226.1(d) that provided a procedure for the issuance of Board and Staff Interpretations and designated "duly authorized" officials).

41 *Fed. Reg.* 45537 (Oct. 15, 1976) (technical change to 12 C.F.R. § 226.1(c) by limiting the defense granted to creditors who act in conformity with duly authorized Staff opinions to liability under § 112 [15 U.S.C. § 1611] and § 130 [15 U.S.C. § 1640]).

43 *Fed. Reg.* 18539 (May 1, 1978) (amended 12 C.F.R. § 226.1(d) regarding procedures for issuing Official Staff Interpretations).

[11] *See, e.g.,* 41 *Fed. Reg.* 28255, 43 *Fed. Reg.* 18539, *supra,* n. 10.

[12] 41 *Fed. Reg.* 28255 (July 9, 1976). The notice of amendment states: "The requirements of 5 U.S.C. § 553 with respect to notice and public participation were not followed in connection with these amendments because they are rules of agency organization and are exempt from such procedures under 5 U.S.C. § 553(b)."

controversial issues of general applicability which involve substantial ambiguities in the regulations and raise significant policy questions."[13] The Board announced that it would continue to exercise discretion in determining the proper subjects for Official Board Interpretations. Presumably the Board will limit its opinions to requests that satisfy the two-pronged test of (1) controversial issues of general applicability that (2) raise significant policy questions.[14]

(b) *Official Staff Interpretations*

Official Staff Interpretations are issued only "upon those requests which, in the opinion of the designated officials, require clarification of technical ambiguities in [Regulation Z] or which have no significant policy implications."[15] The Board thus delegated to the Staff much of the burden of making interpretations regarding technical ambiguities in Regulation Z while reserving the significant and controversial policy decisions for Official Board Interpretations.[16]

[13] 41 *Fed. Reg.* 28255 (July 9, 1976). On May 1, 1978, this reference to Official Board Interpretations was deleted because the Administrative Procedure Act (5 U.S.C. § 551 et seq.) and the Board's *Rules of Procedure* (12 C.F.R. § 262.3) independently provided a procedure for requesting Board action. 12 C.F.R. § 226.1(d) now deals only with Staff Interpretations and procedures. *See* 43 *Fed. Reg.* 18539 (May 1, 1978). Although the procedural reference was changed, the Board's substantive explanation as to the criteria applied in determining the appropriate level of response presumably remains the same.

[14] 41 *Fed. Reg.* 28255 (July 9, 1976).

[15] 41 *Fed. Reg.* 28256 (July 9, 1976). The Board announced that it would, upon formal request of interested parties, reconsider positions taken in Staff Interpretations, and that it might request public comment on certain Interpretations deemed to present controversial or significant policy questions.

[16] The Board did not, however, trivialize the role of Official Staff Interpretations and took steps to prevent this result. The Board spe-

In 1978, the Board amended its procedures for issuing Official Staff Interpretations to provide for a delayed effective date and an opportunity for public comment on them.[17] The amendment provides that Official Staff Interpretations will be published in the *Federal Register* to be effective 30 days after the publication date. If a request for public comment is received or postmarked within 30 days, the effective date of the interpretation will then be suspended. Notice of the suspension of the effective date will be published and the interpretation will be republished for public comment. The public comments are then analyzed and, on the basis of those comments, the Interpretation may be withdrawn or republished in either its initial or a modified form. If public comment has been sought, an Official Staff Interpretation is effective upon its final republication in the *Federal Register*.[18]

cifically excluded approval of a particular creditor's forms from the authority of the designated officials because "the staff review and approval of individual forms would be impractical in light of the inordinant burden on Board resources and the complexity of relating numerous forms to varied methods of operation." 41 *Fed. Reg.* 28255 (July 9, 1976). The approval of standardized examples of forms was not precluded.

[17] 43 *Fed. Reg.* 18539 (May 1, 1978).

[18] The Board's procedure for issuing Official Staff Interpretations is essentially equivalent to "informal" or "notice and comment" rulemaking under § 553 of the Administrative Procedure Act, 5 U.S.C. § 553. That Act requires that (1) notice of the proposed rule be published in the *Federal Register,* together with certain supporting information specified in the Act; (2) interested parties have the right to participate by submitting written data, views or arguments with or without the opportunity for oral presentation; and (3) the rule be published not less than 30 days before its effective date, except for rules providing exemptions, interpretative rules and policy statements or for good cause found and published with the rule. The final rule must contain a concise general statement of its basis and purpose.

Under the Board's amended procedures, Official Staff Interpretations are published in the *Federal Register* 30 days before they become effective. If there is a request for public comment, the effective date of the interpretation is suspended and the interpretation is published for public comment. After all public comments have been reviewed, a final interpretation is issued, effective upon publication. *See* 43 *Fed. Reg.* 18539, 18540 (May 1, 1978). At least one suggestion that Official Board Interpretations were invalid because of failing to comply with the precise procedural requirements of § 553 of the Administrative Procedure Act, 5 U.S.C. § 553, has been rejected. *See Butler v. First National Bank of Commerce,* 552 F.2d 1112, 1113 (5th Cir. 1977).

The Board itself envisioned that Official Staff Interpretations as well as Board Interpretations would play a significant role in creditor compliance.

> The Board expects that creditor compliance with the Act will be enhanced, thereby reducing litigation over technical violations, as a result of the issuance of official staff interpretations.[19]

The Board also equated the importance and effect of Official Board and Official Staff Interpretations for other purposes. For example, both types of interpretations were to be published in the *Federal Register*.[20] Furthermore, any request for either type of interpretation was to be made in the same form and supported with the same documentation.[21]

(c) *Unofficial Staff Interpretations*

Unofficial Staff Interpretations, also referred to as "Public Information Letters" and "Staff Opinion Letters," are to be issued only "where the protection of Section 130(f) of the Act is neither requested nor required, or where time strictures require a rapid response."[22] Public Infor-

[19] 41 *Fed. Reg.* 28255 (July 9, 1976).

[20] *Id.*

[21] 41 *Fed. Reg.* 28255, 28256 (July 9, 1976).

[22] *Id.* Section 130(f), 15 U.S.C. § 1640(f), provides a defense to claims under the Act based upon good faith conformity with rules, regulations, interpretations or approvals by the Board or its duly authorized officials. *See* pp. 25-32, *infra.*

mation Letters were issued beginning in 1969 to provide advice on the technical provisions of the Act and were cited by this Court in 1973.[23]

II. NUMEROUS JUDICIAL ATTEMPTS TO IMPLEMENT THE ACT HAVE PRODUCED INCONSISTENT RESULTS IN CASES OFTEN INVOLVING TECHNICAL, NONSUBSTANTIVE ISSUES

A. The Effect Of Leaving The Issues Principally To Judicial Resolution

In the decade since 1969, the combination of (1) liability triggered by a violation of any provision of the Act or Regulation Z; (2) guaranteed recovery of at least the minimum amount of statutory damages regardless of the nature of the violation or the absence of any injury; and (3) an assurance that the plaintiff's attorneys will receive a fee, has produced a mass of litigation and a confusing array of judicial determinations on literally hundreds of issues under the Act.

As previously recognized by this Court, Congress intended that the Act would require " '*all* creditors to disclose credit information in a *uniform* manner.' " *Mourning, supra,* 411 U.S. at 364 (*citing* the Report of the House Committee on Banking and Currency) (emphasis added). As a direct result of numerous, inconsistent court decisions, this goal simply cannot now be met. It is now literally impossible for *all* creditors to make *uniform* disclosures without at least some of them incurring liability under the automatic damage and attorney fee provisions of the Act.

[23] *See Mourning, supra,* 411 U.S. at 379.

In some areas, such as the one in which the issue raised in this case arises, the Board has attempted to bring order to federal disclosure requirements only to be rebuffed by the courts. The decision that formed the basis for the holding in the instant case provides but one example. In that case the Ninth Circuit summarily accused the Board of injecting "its own uncertainties," perfunctorily rejected one Official Staff Interpretation and two Unofficial Staff Interpretations and then proceeded to substitute its judgment for that of the Board by fashioning its own unique disclosure rule.[24]

Despite this Court's clear expression in *Mourning*, many other courts have shown little real deference to Board pronouncements and, in many cases, have simply rejected them altogether. That, at best, mixed reception has resulted in an understandable reluctance on the part of the Board to exercise its authority. The courts should be admonished to follow the Board's pronouncements in order to encourage the Board to resolve the numerous inconsistencies that have arisen. Only then will there be uniformity and order in the highly complex area of federal credit disclosure regulation.

[24] The decision of the Ninth Circuit in *St. Germain v. Bank of Hawaii,* 573 F.2d 572 (9th Cir. 1977), holding that the Act compels a creditor to disclose the creditor's right to accelerate the debt upon the debtor's default, was followed by the Ninth Circuit in the decision below without further clarification or analysis. Without citing additional authority for its conclusion, the court below stated: "We hold on the basis of *St. Germaine* [*sic*] that Ford Credit is liable to the Milhollins for failure [*sic*] to disclose. . . ." 588 F.2d at 758. The parties in *St. Germain* did not seek review of that decision by this Court. *See Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit* at 25, n.10.

1. The Narrow Issue Presented in This Case

The case now before the Court is simply illustrative of the larger problem being confronted by creditors in connection with innumerable issues that arise under the Act and Regulation Z. In their petition for certiorari, the Petitioners have detailed the inconsistent resolutions of the central issue presented in this case: when the creditor discloses its practice of rebating unearned finance charges on prepayment, is it necessary to disclose separately the creditor's rebate practice if the consumer "prepays" following the creditor's exercise of its right of acceleration. even though the creditor pursues the same rebate practice for prepayment both before and after acceleration.

The Board has resolved this issue against separate disclosure if there is no difference between prepayment that follows acceleration and voluntary prepayment that precedes acceleration. The courts, however, have not been satisfied to abide by this resolution. As the Petitioners accurately observed:

> The Board's position has been rejected by the Ninth and Tenth Circuits, partially rejected by the Fifth Circuit, and partially followed by the Third, Fifth and District of Columbia Circuits. The Ninth Circuit has rejected decisions by the Third, Fifth and Tenth Circuits; the Eighth Circuit has rejected the approach of both the Ninth and the Fifth Circuits; the Tenth Circuit has rejected the views of the Third Circuit; and the Fifth Circuit has issued six separate, internally conflicting opinions.[25]

[25] *Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit* at 10. Since that *Petition* was filed, the Seventh Circuit has also issued an opinion, on July 12, 1979, addressing this issue. *See Croysdale v. Franklin Savings Association,* No. 78-1364 (7th Cir. July 12, 1979).

2. Other Substantive Inconsistencies

Illustrations of other disagreements among the courts are abundant. Most important are the inconsistent rulings dealing with substantive rules governing the disclosures to be made at the time of the credit transaction. These inconsistencies render advance planning impossible for multi-state creditors and make uniform national disclosures unattainable. Advance planning for compliance with the Act involves time consuming and costly creditor activities, including the preparation and distribution of forms, computer programming and the training of personnel. A classic example of the dilemmas posed by conflicting decisions is presented in this case. Petitioner Ford Motor Credit Company, using virtually identical forms, has been held to be in compliance with prepayment disclosure requirements in two Courts of Appeals and in violation of that same requirement by a third Court of Appeals.[26] Even localized creditors face problems from consumers who move from jurisdiction to jurisdiction.

Among the existing inconsistencies now affecting creditors at the planning stage are:

(a) *Who Must Make Disclosures When Multiple Creditors Are Involved*

Most courts agree that a retailer will be an "arranger" of credit if the retailer participates in the preparation of loan documents and has knowledge of their terms. There is a split of authority, however, as to whether the retailer alone must make required disclosures or whether both the retailer and lender must make them.[27]

[26] *Compare Johnson v. McCrackin-Sturman Ford, Inc.,* 527 F.2d 257 (3d Cir. 1975), and *Griffith v. Superior Ford,* 577 F.2d 455 (8th Cir. 1978) *with Milhollin v. Ford Motor Credit Co.,* 588 F.2d 753 (9th Cir. 1978), *cert. granted,* 47 U.S.L.W. 3813 (U.S. June 18, 1979) (No. 78-1487).

[27] *Compare Manning v. Princeton Consumer Discount Co.,* 533 F.2d

(b) *Itemization of License, Title and Registration Fees*

Regulation Z provides that some charges are excludable from the finance charge if itemized and disclosed as part of the amount financed. The courts have disagreed, however, as to whether license, title and registration fees must be separately itemized or can be combined in a single figure designated, for example, as "official fees."[28]

(c) *Method of Identifying Multiple Creditors*

Regulation Z requires that in transactions where there is more than one creditor, each creditor shall be clearly identified. There is a split of authority, however, as to whether this identification must be disclosed together with other required disclosures or whether it simply can be included in any portion of the contract.[29]

(d) *Location of Date for Exercise of Credit Insurance Option*

There is a split of authority as to whether the signed request for optional credit insurance must be separately dated at the signature line or whether it is sufficient that

102 (3d Cir.), *cert. denied,* 429 U.S. 865 (1976), *with Hinkle v. Rock Springs National Bank,* 538 F.2d 295 (10th Cir. 1976), and *Price v. Franklin Investment Co.,* 574 F.2d 594 (D.C. Cir. 1978).

[28] *Compare Meyers v. Clearview Dodge Sales, Inc.,* 539 F.2d 511 (5th Cir. 1976), *cert. denied,* 431 U.S. 929 (1977); and *Grant v. Imperial Motors,* 539 F.2d 506 (5th Cir. 1976) *with* FRB Official Staff Interpretation No. FC-0124, [1974-77 Tranfer Binder] Cons. Cred. Guide (CCH) ¶ 31,724 (Oct. 14, 1977). Some courts still require separate itemization. *See Smith v. Lewis Ford, Inc.,* 456 F. Supp. 1138 (W.D. Tenn. 1978).

[29] *Compare Whitlock v. Midwest Acceptance Corp.,* 575 F.2d 652 (8th Cir. 1978); *Rogers v. Frank Jackson Lincoln-Mercury,* 458 F. Supp. 1387 (N.D. Ga. 1978); *Cenance v. Bohn Ford, Inc.,* 430 F. Supp. 1064 (E.D. La. 1977); and *Lauletta v. Valley Buick, Inc.,* 421 F. Supp. 1036 (W.D. Pa. 1976) *with Milhollin v. Ford Motor Credit Co.,* 588 F.2d 753 (9th Cir. 1978), *cert. granted,* 47 U.S.L.W. 3813 (U.S. June 18, 1979) (No. 78-1487); *Sharp v. Ford Motor Credit Co.,* 452 F. Supp. 465 (S.D. Ill.

the date of the signature appear elsewhere in the note or contract containing the disclosures.[30]

(e) *Adequacy of the Description of Property Subject to a Security Interest*

Under Regulation Z, creditors are required to disclose a description or identification of the type of security interest taken by the creditor and provide a clear identification of the property to which it relates. There is a substantial split of authority as to the detail with which property subject to a security interest must be disclosed and, specifically, as to the necessity of itemizing the property involved.[31]

(f) *Disclosure Format*

Regulation Z requires that disclosures be made in a clear and conspicuous manner and in a meaningful se-

1978); *Augusta v. Marshall Motor Co.,* 453 F. Supp. 912 (N.D. Ohio 1977); and *Grey v. European Health Spas, Inc.,* 428 F. Supp. 841 (D. Conn. 1977).

[30] *Compare Hayslip v. Dunlap Chevrolet Co.,* 560 F.2d 192 (5th Cir. 1977); *Meehan v. Nelsonville Mobile Home Sales,* 387 F. Supp. 1395 (S.D. Ohio 1975); *Porter v. Household Finance Corp.,* 385 F. Supp. 336 (S.D. Ohio 1974); *Doresey v. Termplan, Inc.,* 5 Cons. Cred. Guide (CCH) ¶ 98,691 (N.D. Ga. 1974) (typewritten date sufficient); *Young v. Ouachita National Bank,* 428 F. Supp. 1323 (W.D. La. 1977) (same result) *with Hamilton v. G.A.C. Finance Corp.,* 5 Cons. Cred. Guide (CCH) ¶ 98,804 (N.D. Ga. 1974); *Brown v. Commercial Credit Plan, Inc.,* [1969-73 Transfer Binder] Cons. Cred. Guide (CCH) ¶ 98,976 (N.D. Ga. 1973); *Jenkins v. Rhodes Furniture, Inc.,* No. 16266 (N.D. Ga., filed June 29, 1973); and *McTerry v. Household Finance Corp.,* 5 Cons. Cred. Guide (CCH) ¶ 98,803 (N.D. Ga. 1974).

[31] *Compare Madison v. United Finance Co.,* 571 F.2d 1125 (9th Cir. 1978); *Jones v. Goodyear Tire & Rubber Co.,* 442 F. Supp. 1157 (E.D. La. 1977); *Sneed v. Beneficial Finance Co.,* 410 F. Supp. 1135 (D. Haw. 1976); and *Cadmus v. Commercial Credit Plan, Inc.,* 437 F. Supp. 1018 (D. Del. 1977) *with Anthony v. Community Loan & Investment Corp.,* 559 F.2d 1363 (5th Cir. 1977); *Burroughs v. Local Acceptance Co.,* 432 F. Supp. 752 (W.D. N.C. 1977).

quence. The courts have reached contrary determinations, however, as to whether the Act requires horizontal as opposed to vertical columns, subtractional as opposed to additional sequences, and specific groupings of related items.[32]

(g) *Disclosure of Loan Proceeds*

The courts have split on whether, in order to avoid civil liability, creditors must state the amount of the loan proceeds, exclusive of other charges that are financed. The Fifth Circuit requires loan proceeds to be disclosed separately, while the Seventh Circuit holds that where the lender's disclosures are in good faith conformity with Regulation Z, there is no liability for failure to disclose the amount of loan proceeds.[33]

B. The Volume Of Litigation Is Enormous And Often Involves Trivial Issues

It is impossible to determine the number of alleged violations raised and the number of lawsuits actually

[32] *Compare Allen v. Beneficial Finance Co.*, 531 F.2d 797 (7th Cir.), *cert. denied*, 429 U.S. 885 (1976); and *Barber v. Kimbrell's, Inc.*, 424 F. Supp. 42 (W.D. N.C. 1976), *aff'd on this ground*, 577 F.2d 216 (4th Cir.), *cert. denied*, 99 S.Ct. 329 (1978) *with Basham v. Finance America Corp.*, 583 F.2d 918 (7th Cir. 1978), *cert. denied*, 99 S.Ct. 1046 (1979); and FRB Off. Staff Int. No. FC-0054, [1974-77 Transfer Binder] Cons. Cred. Guide (CCH) ¶ 31,552 (Mar. 21, 1977).

[33] *Compare Pollock v. General Finance Corp.*, 535 F.2d 295 (5th Cir. 1976), *aff'd on rehearing*, 552 F.2d 1142 (5th Cir.), *cert. denied*, 434 U.S. 891 (1977); *McGowan v. Credit Center of North Jackson, Inc.*, 546 F.2d 73 (5th Cir. 1977); *Liner v. Aetna Finance Co.*, 555 F.2d 1241 (5th Cir. 1977); and *Ballew v. Associates Financial Services Co.*, 450 F. Supp. 253 (D. Neb. 1976), *with DeJaynes v. General Finance Corp.*, 442 F. Supp. 377 (S.D. Ill. 1977), *modified sub nom. Basham v. Finance America Corp.*, 583 F.2d 918 (7th Cir. 1978), *cert. denied*, 99 S.Ct. 1046 (1979); and *Johnson v. Household Finance Corp.*, 453 F. Supp. 1327 (S.D. Ill. 1978).

brought under the Act.[34] One statistic alone, however, is illustrative of the extent to which judicial resources are being devoted to alleged violations of the Act. Since 1972, there appear to have been more than 14,000 cases brought in United States District Courts involving Truth in Lending claims.[35] The conclusion is inescapable that the Act has generated an untold amount of litigation, much of which involves no significant policy question or substantial wrong. Rather, the allegations often involve nothing more than technical violations of matters that do not bear on credit cost shopping and merely impose a penalty on creditors unable to chart the shifting shoals created by a constant flow of court determinations.

The disclosure requirements must, of course, effectuate the Congressional purpose of the Act. However, many of the cases under the Act have been brought by consumers who were not misled or misinformed by the credit disclosures that they attack. Yet most courts have held that they have no discretion with respect to the imposition of civil liability if they find a violation of the Act or Regula-

[34] The annual reports of the Director of the Administrative Office of the United States Courts compile Truth in Lending Act cases in a category that also includes a minimal number of odometer fraud cases filed under the Motor Vehicle Information and Cost Savings Act and cases filed under the Interstate Land Sales Full Disclosure Act. In addition, no accurate figures exist as to the number of cases brought in state courts.

[35] 1975 *Annual Report of the Director*, Administrative Office of the United States Courts, Table 32, p. 221; 1978 *Annual Report of the Director*, Administrative Office of the United States Courts, Table 34, p. 211; 1979 *Annual Update* (from computer printout). The Administrative Office of the United States Courts first began tabulating Truth in Lending cases in 1972, and the 1979 computer printout is current through June 30, 1979. Precisely 14,344 cases were brought in the reporting category that includes Truth in Lending. Based on The Association's experience in this area and informal conversations with staff members of the Administrative Office it seems that virtually all cases contained in this reporting category involve claims raised under the Act.

tion Z, no matter how technical. *See Grant v. Imperial Motors,* 539 F.2d 506, 510 (5th Cir. 1976). This is true even if the violation is miniscule in scope and amount. *Id.* In the absence of guidance from the Board, upon which creditors can rely, this situation produces a powerful incentive to litigate any arguable or even not so arguable position.

As a result, creditors and the courts have become embroiled in such issues as whether required disclosures must be made *vertically* rather than *horizontally,* and whether "subtractional disclosures" may be used. *Basham v. Finance America Corp.,* 583 F.2d 918 (7th Cir. 1978), *cert. denied,* 99 S.Ct. 1046 (1979); *Allen v. Beneficial Finance Co.,* 531 F.2d 797, 801 (7th Cir.), *cert. denied,* 429 U.S. 885 (1976). *See also Sanders v. Auto Associates, Inc.,* 450 F. Supp. 900, 904 (D. S.C. 1978).

In *Powers v. Sims & Levin Realtors,* 396 F. Supp. 12 (E.D. Va. 1975), *aff'd in part, rev'd in part,* 542 F.2d 1216 (4th Cir. 1976), the defendant's disclosure statement read:

FINANCE CHARGES:		
INTEREST	$2,093.15	
BROKERAGE	250.00	
TOTAL FINANCE CHARGES		$2,343.15

Plaintiff argued that Regulation Z requires creditors to disclose "the total amount of the finance charge, with description of each amount included, using the term 'finance charge'."[36] The court found that the "total amount of

[36] 12 C.F.R. § 226.8(d)(3).

the finance charge," explicitly required to be labelled as a "finance charge," was instead denoted as "TOTAL FINANCE CHARGES" in defendant's disclosure form. In ruling against the creditor the court stated:

> This requirement is quite technical, but the Congress did not intend creditors to escape liability where only technical violations were involved. Indeed, the technical requirements of the act must be strictly enforced if the goal of standardization of terms, which is a requisite if consumers are to be able to make meaningful comparisons of available credit alternatives, is to be achieved. The Court concludes that, since the defendant has failed to state the total amount of finance charge using the term "finance charge," it has violated § 226.8(d)(3) of 12 C.F.R. and summary judgment shall be entered for the plaintiff.

396 F. Supp. at 20. The Association respectfully suggests that this sort of litigation is simply not a fruitful use of court time or litigants' funds.

III. THE BASIC POLICY ISSUES: THE NEED FOR CERTAINTY AND COMPREHENSIVE RULES

A. The Need For Uniformity And Predictability

The major need both for creditors attempting to comply with the Act and for consumers seeking comparable credit costs, is for a single set of consistent rules. In most instances, the precise shape of the final rule is of far less importance than that there be one specific, understandable rule, drafted by the agency familiar with the regulated area, to provide a comprehensive response not limited to the facts of a specific case.

Because of their technical nature, as shown by the liti-

gated examples described above, alternative resolutions of most questions arising under the Act make very little difference either to creditors or to consumers. As in the case now before this Court, the precise form and shape of the rule adopted is insignificant when compared to the need for one, and only one, uniform and nationally recognized rule. Creditors can and will prepare disclosure forms that reflect *any* rule regarding pre- and post-acceleration prepayment rebate rights. Their not unreasonable plea is that there be a clear and comprehensive enunciation of a single rule and a universal judicial recognition that creditors can look to that rule with safety. There is no court of nationwide jurisdiction to provide the uniformity, such as the Temporary Emergency Court of Appeals brings to administrative utterings of the Department of Energy. As a result, either this Court, the Board, or no one at all will fulfill that function.

B. Deliberative Rulemaking Is The Method That Should Be Used To Establish Comprehensive Rules To Implement The Technical Requirements Of The Act

Because resolution of these issues is often (1) technical and (2) of little practical or policy import, the courts often arrive at inconsistent resolutions. For this reason alone, in addition to the burden on the courts, adjudication is a poor choice upon which to place primary reliance for development of a singular and comprehensive rule. Far preferable is the alternative contemplated by Congress: to place primary reliance upon the Board to implement the Act. In the Truth in Lending area, the Board, and only the Board, acting within constitutional and procedural safeguards, should be allowed to implement and interpret the requirements contained in the Act. Once the

Board has spoken on these technical issues, the courts should acknowledge and defer to these administrative resolutions.

The Association submits that Truth in Lending is uniquely well suited to reliance on administrative rulemaking. Rules must be carefully fashioned in order to apply to widely diverse consumer credit transactions. Adopting those rules requires extensive knowledge of, and appreciation for, nationwide credit practices and procedures. In addition, many of these rules involve precise line drawing that is often not available to courts that are confined to addressing the specific facts of the case before them. The inability of a court to provide a complete rule often has resulted in more questions being raised than resolved. *See, e.g., Basham v. Finance America Corp.*, 583 F.2d 918 (7th Cir. 1978), *cert. denied,* 99 S.Ct. 1046 (1979).

In addition, the mechanism through which creditors must discharge their obligations under the Act—detailed disclosure statements often integrated with retail installment sales contracts or promissory notes—highly commends the use of prospective rulemaking that affords an opportunity to implement new or revised disclosure requirements. The broad range of transactions covered by the Act has generated an imposing number of disclosure forms that are often distributed throughout a credit seller's retail network or a bank's branch system. For instance, as a nationwide creditor, Petitioner Ford in this case must distribute forms all over the country. In light of this comprehensive paper network, it is literally impossible to comply instantaneously with a court decision that immediately renders innumerable disclosure forms unlawful. The sheer mechanical task of drafting new disclosure pro-

visions, having disclosure forms printed, collecting obsolete forms, distributing new forms and training personnel in the use of new forms simply should not be required each time a court adopts a new or slightly different interpretation of the Act or Regulation Z. Moreover, such changes as are required should be preceded by an adequate amount of lead time that is simply not available when responding to court decisions that are immediately effective when a decision is announced.

In short, the technical nature of the Act's requirements, the need for a single national rule and the importance of prospective application that provides sufficient time for the physical task of replacing old disclosure forms make the resolution of the myriad of issues arising under the Act uniquely suited for resolution by an administrative agency, in this case, the Board.

IV. CONGRESS CLEARLY INTENDED THAT THE FEDERAL RESERVE BOARD, ACTING THROUGH BOTH REGULATIONS AND INTERPRETATIONS, WAS TO IMPLEMENT THE ACT. THAT ROLE SHOULD BE ACKNOWLEDGED BY THE COURTS

A. The Legislative History Clearly Demonstrates That Congress Delegated To The Board The Responsibility To Create A Uniform National System Of Consumer Credit Disclosures

The purpose of the Act, as delineated by Congress, is to assure "a meaningful disclosure of credit terms" to enable the consumer to shop for the best credit terms and "avoid the uninformed use of credit."[37] Congress designated the Board as the agency charged with the implementation and enforcement of the Act,[38] and accorded the Board broad powers to promulgate regulations to implement the Act. Creditors were directed to comply with the Board's regulations.[39] As this Court stated in *Mourning:*

> To accomplish its desired objective, Congress determined to lay the structure of the Act broadly and to entrust its construction to an agency with the necessary experience and resources to monitor its operation.

411 U.S. at 364.

Pursuant to its statutory grant of authority, the Board promulgated Regulation Z, reflecting the Board's expertise in the area regulated by the Act. Recognizing that even broad authority to adopt regulations was not sufficient to assure responses to technical questions arising under the Act, Congress has twice amended the original Act to provide for additional sources of interpretation. Section 130(f) of the Truth in Lending Act in its current form provides:

> (f) No provision of this section or section 1611 of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Board or in conformity with any interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the Board to issue such interpretations or approvals under such procedures as the Board may prescribe therefor, notwithstanding that after such act or omission has occurred, such rule, regulation, interpretation, or approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.[40]

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[37] 15 U.S.C. § 1601.

[38] 15 U.S.C. §§ 1604, 1607.

[39] 15 U.S.C. §§ 1604, 1631(a).

[40] 15 U.S.C. § 1640(f).

This provision was adopted in two stages. A 1974 amendment first established a defense limited to compliance with any rule, regulation or interpretation thereof by the Board.[41] The defense was broadened in 1976 to include conformity by a creditor with any "interpretation or approval" by any official or employee of the Federal Reserve System duly authorized by the Board to issue such interpretations or approvals.[42]

The Congressional desire to curtail litigation and promote predictability in Truth in Lending is obvious from the language of § 130(f). The legislative history emphatically confirms this. The first effort to provide greater interpretative certainty was made in 1973, when the Senate

[41] Pub. L. No. 93-495, Title IV, § 406, 88 Stat. 1518 (Oct. 28, 1974). That amendment added § 130(f):

> (f) No provision of this section or section 112 imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Board, notwithstanding that after such act or omission has occurred, such rule, regulation, or interpretation is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

[42] Pub. L. No. 94-222, § 3(b), 90 Stat. 197 (Feb. 27, 1976). This amendment added the following italicized text:

> (f) No provision of this section or section 112 imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Board *or in conformity with any interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the Board to issue such interpretations or approvals under such procedures as the Board may prescribe therefor,* notwithstanding that after such act or omission has occurred, such rule, regulation, interpretation, *or approval* is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

This detailed mechanism for providing authoritative interpretations has since been used in two other statutory schemes. *See* Fair Debt Collection Practices Act, 15 U.S.C. § 1692k(e), and Electronic Fund Transfer Act, 15 U.S.C. § 1693m(d).

Committee on Banking, Housing and Urban Affairs reported S. 2101. Among other amendments, the bill provided a defense for compliance with rules, regulations and interpretations of the Board. S. 2101 passed the Senate, but was never acted upon by the House.[43] Titles I and II of this bill, however, subsequently were offered as amendments to H.R. 11221,[44] and this amended bill was adopted by Congress on October 10, 1974.[45] Section 406 of that act provided the § 130(f) good faith compliance defense.[46]

The Conference Report to H.R. 11221 tersely states:

> The Senate bill provided a series of basically technical amendments designed to improve the administration of the Truth in Lending Act. The House bill contained no comparable provisions. The conferees accepted the Senate provisions.[47]

The Senate Report, however, which accompanied S. 2101, the source of the H.R. 11221 defense provision, provides the following explanation of the purpose of the amendment:

> The Truth in Lending Act is highly technical and the Committee does not believe a creditor should be forced to choose between the Board's construction of the Act and the creditor's own assessment of how a court may interpret the Act. Accordingly, the

[43] S. 2101 was passed by the Senate 90-0 on July 23, 1973. *See* 1973 *Congressional Quarterly Almanac* 51-S.

[44] *See* 120 *Cong. Rec.* 19210 (1974).

[45] Pub. L. No. 93-495, Title IV, 88 Stat. 1518 (Oct. 28, 1974). For passage details, *see* 120 *Cong. Rec.* 34770 (1974) and 120 *Cong. Rec.* 34886 (1974).

[46] Pub. L. No. 93-495, Title IV, § 406, 88 Stat. 1518 (Oct. 28, 1974) (codified at 15 U.S.C. § 1640(f)).

[47] H. Conf. Rep. No. 93-1429, 93rd Cong., 2nd Sess. 37 (Oct. 4, 1974).

> Committee recommends an amendment to Truth in Lending requested by the Board which would relieve a creditor of any civil liability under Truth in Lending for any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Board. In order to confer immunity from civil liability, the rule, regulation, or interpretation thereof must be approved by the Board itself and not merely by the staff of the Board. This amendment is contained under section 206 of Title II.
>
> The Committee is also mindful of the uncertainty of many creditors as to whether their particular disclosure form and related procedures are in compliance with Truth in Lending and the Board's regulations. The Committee expects the Board to use its new authority under Section 206 to reduce the burden of complying with Truth in Lending. One method for accomplishing this objective would be for the Board to publish standard disclosure forms, which if adhered to, would be deemed by the Board to be in compliance with the Truth in Lending Act and the Board's regulations. In addition to removing many uncertainties and preventing hyper-technical litigation, this approach has the added advantage of encouraging standardized disclosure formats, thereby enabling consumers to become more aware of the information disclosed.[48]

The Senate Report provides helpful insight into the Congressional intent behind its effort, in the words of the floor managers, to "improve the administration" of the Act.[49] The obvious purpose was to provide creditors with a safe

[48] S. Rep. No. 93-273, 93rd Cong., 1st Sess. 13014 (June 28, 1973).

[49] 120 *Cong. Rec.* 34766 (1974) (remarks of Representative Fernand J. StGermain, D-R.I.).

harbor from interpretative uncertainties and to prevent hypertechnical litigation.

Two years later even this authority was found to be insufficient. Section 130(f) was broadened significantly in 1976 to allow creditors to rely on interpretations by any official or employee of the Board duly authorized by the Board to issue the interpretations.[50]

This second extension of the § 130(f) defense resulted from an amendment to Senate Bill S. 2672, made on the floor of the House of Representatives on December 16, 1975, by Representative Fernand J. StGermain (D-R.I.).[51] The language regarding the § 130(f) good faith compliance defense was originally contained in H.R. 10561, a bill reported out of the Consumer Affairs Subcommittee of the House Banking, Currency and Housing Committee on October 28, 1975. In introducing a clean bill reflecting Committee amendments on November 17, 1975,[52] its principal sponsor and the Chairman of the Consumer Affairs Subcommittee, Representative Frank Annunzio (D-Il.), stated:

> This act also addresses itself to the important problem of compliance with the Truth in Lending Act. Creditors are often hit with costly lawsuits for unintentional technical violations because, even though they attempt to comply, the laws and regulations are too complicated and ambiguous. An amendment to section 130f, the Good Faith Compliance with the Truth in Lending Act, I believe, will help resolve these problems.
>
> Section 130f exempts from liability under truth

[50] *See* n. 42, *supra*.

[51] *See* 121 *Cong. Rec.* 40802 (1975).

[52] *See* 121 *Cong. Rec.* 36926 (1975).

in lending creditors who are acting in good faith in conformity with any rule, regulation, or interpretation by the Federal Reserve Board. The amendment adds to the exemption any interpretation or approval by an official or employee of the Board authorized by the Board to issue such interpretation or approval under such procedures as the Board may prescribe.

> *With formal advisory opinions, creditors will at last have a reliable way to know how to comply with truth in lending.* Consumers should benefit because creditors will no longer be able to explain away violations by claiming they could not find o how to comply. Consumers, creditors, and the Board should find they are involved in less litigation.

(Emphasis added.)[53]

The House amendment was warmly received in the Senate. Senator Jake Garn (R-Ut.), the ranking minority member of the Consumer Affairs Subcommittee of the Senate Banking, Housing and Urban Affairs Committee, commented:

> A most needed House amendment to S. 2672 which I fully support revises section 130(f) of the Truth in Lending Act to authorize the Federal Reserve Board to delegate to an official or employee of the Federal Reserve System the power *to issue binding interpretations of the Truth in Lending Act.* Under the current section 130(f) a creditor is exempted from liability under truth in lending when he acts in good faith in conformity with any rule, regulations, or interpretation by the Federal Reserve Board. This amendment will encourage the Board to aid those acting in good faith to comply with the law. It is particularly needed in the case of small

[53] 121 *Cong. Rec.* 36927 (1975) (remarks of Representative Annunzio, D-Il.).

> businesses that do not have expensive legal talent to aid them in conforming with this complex law.

(Emphasis added.)[54]

Senator William Proxmire (D-Wi.), Chairman of the Senate Banking, Housing and Urban Affairs Committee and the sponsor of both the original Act adopted in 1968 and S. 2672,[55] stressed that interpretations and approvals issued by duly authorized staff would have a "binding effect in subsequent litigation" and that an "interpretation would constitute an absolute defense to a creditor" until reversed by the Board itself or, presumably, by a court properly applying an appropriate standard of review.

> [T]he House amendment would authorize the Federal Reserve Board to delegate to its staff the authority *to issue interpretations or approvals that would have binding effect in subsequent litigation* over violations of the Truth in Lending Act. That is, compliance with such an interpretation would *constitute an absolute defense* to a creditor until that interpretation was reserved by higher authority.
>
> . . .
>
> The Senate [in exchange for the House accepting Senate amendments proposed to other House amendments] would be accepting the House provision concerning the delegation to Federal Reserve

[54] 122 *Cong. Rec.* 2836 (1976) (remarks of Senator Garn, R-Ut.).

[55] Senator Proxmire replaced former Senator Paul Douglas (D-Il.) as the champion of Truth in Lending legislation after Douglas' defeat in 1967. On January 11, 1967, Proxmire introduced S. 5, a Truth in Lending bill that passed the Senate unanimously by a 92-0 roll-call vote on July 11, 1967. Following a conference with the House of Representatives to resolve differences between S. 5 and H.R. 11601, S. 5 became the basis of the original Truth in Lending Act. *See* 1968 *Congressional Quarterly Almanac* 206-207.

> Board staff of the authority to issue *binding interpretations of the law and regulations.*
>
> Mr. President, there are important provisions in this bill which should not be delayed. I have every reason to believe that the House will be agreeable to the amendments I am offering in a spirit of compromise, and I urge the Senate to accept them.

(Emphasis added.)[56] The Senate concurred in these House amendments as urged by Senator Proxmire, the House agreed with other Senate amendments on February 9, 1976,[57] and the bill was signed by the President on February 27, 1976.[58]

Through this two-step process, creditors were provided a defense under § 130(f) of the Act for any act done or omitted in good faith (1) in conformity with any interpretation, regulation or interpretation thereof by the Board or (2) in conformity with any interpretation or approval by an official or employee duly authorized by the Board to issue such interpretations or approvals. It is plain that the purpose and effect of these amendments was to allow the Board and duly authorized members of its Staff to issue interpretations of the Act and to permit creditors to rely on these interpretations.

Moreover, merely allowing a specific creditor to avoid civil liability in one case will not accomplish this goal. Predictability is necessary for creditors to structure their activities in order to comply with the Act, for uniform administrative enforcement of the Act, and to curtail

[56] 122 *Cong. Rec.* 2837 (1976) (remarks of Senator Proxmire, D-Wi.).

[57] *See* 122 *Cong. Rec.* 2851-2853 (1976).

[58] 1976 *Congressional Quarterly Almanac* 1026. *See also* 122 *Cong. Rec.* D234 (daily ed. March 1, 1976).

litigation involving the same issue. To effect these goals the Board's authoritative statements should be recognized as being the proper interpretation of the Act. The insufficiency of simply allowing these interpretations to shield the first creditor sued in the first case on a specific issue is illustrated by one court's comment about the "good faith" requirement that conditions the availability of the § 130(f) defense. Clouding the ability of other creditors to avoid civil liability on the basis of Board pronouncements, one court of appeals has suggested that a creditor may lack good faith if *any* court of appeals has rejected a Board pronouncement:

> Section 1640(f) [§ 130(f)] limits its exemption from liability to "good faith" conformity to regulations and interpretations. We do not reach the issue of whether continued adherence by the creditors to their present form of disclosure after at least one circuit has ruled that it is illegal vitiates their "good faith." *See Pollock v. General Finance Corp.*, 535 F.2d 295 (5th Cir. 1976), *aff'd on rehearing,* 552 F.2d 1142 (5th Cir. 1977), *cert. denied,* 434 U.S. 891, 98 S.Ct. 265, 54 L.Ed.2d 176 (1977).

Basham v. Finance America Corp., 583 F.2d 918, 923 n. 7 (7th Cir. 1978), *cert. denied,* 99 S.Ct. 1046 (1979).

B. The Judicial Response Has Varied Widely Since This Court's Guidance In Mourning

In 1973 this Court observed that Congress elected to draw a broad statute and give similarly broad rulemaking authority to the Board.

> To accomplish its desired objective, Congress determined to lay the structure of the Act broadly and to entrust its construction to an agency with

the necessary experience and resources to monitor its operation. Section 105 delegated to the Federal Reserve Board broad authority to promulgate regulations necessary to render the Act effective. . . . In addition to granting to the Board the authority normally given to administrative agencies to promulgate regulations designed to "carry out the purposes" of the Act, Congress specifically stated:

> "These regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper . . . to prevent circumvention or evasion [of the Act], or to facilitate compliance therewith."

Mourning, supra, 411 U.S. at 365-66 (footnote omitted).

The preeminent role in implementing the Act given to the Board by Congress and recognized by this Court in *Mourning* has been often disregarded by the courts. The complex regulatory framework, adopted in 1968 and fine-tuned through expanding Board powers in 1974 and 1976, has failed to provide clarity and certainty because many courts have merely glanced at Board pronouncements and then rejected them, substituting their own views of the Act and Regulation Z.

1. Judicial Response to Regulation Z

Illustrative of the approach of some courts has been their questioning of the stature of Regulation Z. This Court in *Mourning* determined that the appropriate review standard required that the validity of Regulation Z must be upheld "so long as it is 'reasonably related to the purposes of the enabling legislation'," *Mourning, supra,* 411 U.S. at 369 (citations omitted). In applying this standard of review,

the Court has recognized Regulation Z as a legislative rule. *See American Telephone & Telegraph Co. v. United States,* 299 U.S. 232 (1936); K. Davis, *Administrative Law of the Seventies,* §§ 5.01, 5.03-3, at 145, 159 (1976).

If that were not enough, *Mourning* specifically acknowledged the Board's role and admonished the courts to defer to Board pronouncements:

> That some other remedial provision might be preferable is irrelevant. We have consistently held that where reasonable minds may differ as to which of several remedial measures should be chosen, courts should defer to the informed experience and judgment of the agency to whom Congress delegated appropriate authority. [Citations omitted.]

Mourning, supra, 411 U.S. at 371-72.

This Court has also made it clear that the Board may be "designedly creative." Describing *Mourning* in *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1 (1976), the Court observed:

> But the role of regulations is not merely interpretative; they may instead be designedly creative in a substantive sense, if so authorized. *See, e.g., Mourning v. Family Publications Service, Inc.* [citation omitted].

428 U.S. at 37, n.40.

Under standard administrative law doctrines, a legislative rule actually creates law and is as binding upon a court as a statute. K. Davis, *Administrative Law Treatise* § 5.05, at 314 (1958). As a legislative rule, Regulation Z is binding on a reviewing court so long as it is within the Board's delegated authority, has been adopted in accordance with appropriate procedural requirements and is reasonably related to the purposes of the Act.

These doctrines have not always prevailed under Truth in Lending. Some, but by no means all, lower courts have recognized the Congressional intent to delegate rulemaking and interpretative powers to the Board. As the court stated in *DeJaynes v. General Finance Corp.*, 442 F. Supp. 377 (S.D. Ill. 1977), *modified sub nom. Basham v. Finance America Corp.*, 583 F.2d 918 (7th Cir. 1978), *cert. denied*, 99 S.Ct. 1046 (1979):

> The obvious intent of the Act was to create, through Board regulations, national standards governing consumer credit. That result can only be achieved by interaction between the chosen administrative agency and the legislative body. All else is chaos. If each court has the power to determine that a regulation of the Board is incomplete, or that it omits some element which the particular court deems essential, then uniform, national application of the Act is an unattainable myth. The construction of the Act would certainly be as divergent as the several views which each of the courts of appeals might espouse.

442 F. Supp. at 381.

Other courts have properly relied upon the Board as the last word and have been reluctant to "fill in holes which the courts perceived in the regulatory matrix." *Martin v. Commercial Securities Co.*, 539 F.2d 521, 525 (5th Cir. 1976). *Griffith v. Superior Ford*, 577 F.2d 455 (8th Cir. 1978), in a similar holding, found the absence of any reference to acceleration clauses in the Act and Regulation Z important:

> In our judgment, no . . . additional disclosure requirement is either explicit or implicit in the language of the Regulation. To the extent the absence of such a disclosure requirement may be perceived by the courts as a hole in the regulatory matrix, only the Federal Reserve Board is authorized to fill the hole. It is for the Board itself, not the courts, to assess the potential impact of the exercise of the right of acceleration upon the credit customer and on the basis thereof to determine whether to explicitly expand the existing disclosure requirements. We are unwilling to usurp the prerogatives of the Board.

577 F.2d at 460.

Regrettably, this deference is not universal. Some courts have felt compelled to add disclosure requirements even in the absence of a statutory or regulatory mandate. In *St. Germain v. Bank of Hawaii*, 573 F.2d 572 (9th Cir. 1977), implicitly rejecting the role ascribed to the Board by Congress, the court stated that Congressional silence should not deter the court from imposing disclosure requirements:

> Congressional silence is a dubious indicium of legislative intent, especially when we are dealing with a statute like TILA, in which Congress traced very few lines on a new large canvass. Despite the lack of articulate draftmanship, TILA manifests Congress' overriding interest in disclosure to provide consumer protection.

573 F.2d at 574.

Judicial analyses such as that contained in *St. Germain*—the single decision relied upon by the court below—undermine the ability of creditors to look solely to the Board for guidance in making credit disclosures and are directly inconsistent with this Court's decision in *Mourning*.

Certain courts have rejected the Board's interpretation of the Act as implemented through Regulation Z. In one instance, the Board, by regulation, specifically authorized the omission of a specific type of disclosure, but one court

imposed the requirement nonetheless. In *Pollock v. General Finance Corp.*, 535 F.2d 295 (5th Cir. 1976), *aff'd on rehearing,* 552 F.2d 1142 (5th Cir.), *cert. denied,* 434 U.S. 891 (1977), the creditor failed to state separately the amount of loan proceeds of which the consumer would have actual use, as opposed to disclosing the amount borrowed. This omission was *in compliance with Regulation Z,* but *failed to comply with the court's interpretation of the Act.* The court held:

> Under § 1604, the Board's powers to make "adjustments and exceptions for any class of transactions" is limited to efforts "to effectuate the purposes of [the Act], to prevent circumvention or evasion thereof, or to facilitate compliance therewith." *The Board's regulation, sought to be justified by a statutory contradiction that appears to us not to exist, cannot be justified* under § 1640. Therefore, we reaffirm our holding that the Act requires that a creditor make a labeled disclosure of actual loan proceeds in accordance with § 1639(a).

552 F.2d at 1144 (emphasis added).

Other courts have steadfastly refused to recognize the binding nature of Regulation Z. *Philbeck v. Timmers Chevrolet, Inc.,* 499 F.2d 971 (5th Cir. 1974), specified the "four sources of law and interpretation" governing this area as (1) the Act, (2) Regulation Z, (3) Federal Reserve Board Interpretation, and (4) Federal Reserve Board Staff opinions. The court then made the defective assertion that the "three latter authorities, *though not binding on the Court,* are entitled to great weight." 499 F.2d at 976 (emphasis added).

In *Jones v. East Hills Ford Sales, Inc.,* 398 F. Supp. 402 (W.D. Pa. 1975), *aff'd,* 532 F.2d 746 (3d Cir. 1976), the court, citing *Philbeck,* noted the various types of pronouncements that the Board could issue and then stated:

> These latter authorities, including Regulation Z, although not absolute and binding on a Court, are entitled to great weight and deference in construing the requirements of the Truth in Lending Act.

398 F. Supp. at 404.

Thus some courts, despite this Court's declarations in *Mourning,* have cast a shadow over the ability of creditors to look to, and rely upon, even Regulation Z.

2. *Board and Staff Interpretations Receive Uneven Treatment and Are Often Disregarded by Courts*

In addition to attempting to "second guess" the Board's policy determinations as reflected by Regulation Z, interpretations from the Board and its Staff have a checkered career in the courts, notwithstanding their often "official" status and their express recognition by Congress. Other courts have, in many cases, virtually ignored these carefully considered interpretations.

(a) *Numerous and Discordant Formulations of the Due Deference Test Render It Meaningless and Obsolete*

In considering Official Board Interpretations, Official Staff Interpretations and Unofficial Staff Interpretations, the courts have fashioned a wide array of tests as to the weight to be afforded to them.

Official Board Interpretations are "entitled to great weight," *Philbeck v. Timmers Chevrolet, Inc.,* 499 F.2d 971, 976 (5th Cir. 1974) (general reference); and are "entitled to great deference and it compels our reversal of the district court's alternative holding," *Meyers v. Clearview*

Dodge Sales, Inc., 539 F.2d 511, 517 (5th Cir. 1976), *cert. denied,* 431 U.S. 929 (1977) (referring to a specific Board Interpretation, 12 C.F.R. § 226.820).

An Official Staff Interpretation, "although not binding on the Courts, is entitled to respect," *Griffith v. Superior Ford,* 577 F.2d 455, 458 (8th Cir. 1978) (referring to FC-0054);[59] *St. Germain v. Bank of Hawaii,* 573 F.2d 572, 574 (9th Cir. 1977) (referring to FC-0054); is "entitled to some deference" or to " 'mere deference';" *Tarplain v. Baker Ford, Inc.,* 466 F. Supp. 1340, 1347 (D. R.I. 1979) (referring to FC-0054); is "entitled to deference," *McDaniel v. Fulton National Bank,* 571 F.2d 948, 950 (5th Cir. 1978) (referring to FC-0054); and to these pronouncements "a Court . . . owes great deference," *Harvey v. Housing Development Corp.,* 451 F. Supp. 1198, 1206 (W.D. Mo. 1978) (referring to FC-0096).

Unofficial Staff Interpretations are "entitled to deference," *Basham v. Finance America Corp.,* 583 F.2d 918, 925 (7th Cir. 1978), *cert. denied,* 99 S.Ct. 1046 (1979) (referring to Unofficial Staff Interpretations Nos. 829, 983 and 1053);[60] "entitled to great weight," *Philbeck v. Timmers Chevrolet, Inc.,* 499 F.2d 971, 976 (5th Cir. 1974); "entitled to substantial weight," *Taylor v. R. H. Macy & Co.,* 481 F.2d 178, 180 (9th Cir.), *cert. denied,* 414 U.S. 1068 (1973) (referring to an Unofficial Staff Interpretation); a source " 'to which courts . . . may properly resort for guidance,' " *Eby v. Reb Realty, Inc.,* 495 F.2d 646, 650 (9th Cir. 1974) (referring to several Unofficial Staff Interpretations);

[59] The Board designates Official Staff Interpretations as "FC— ——". The FC designation, referring to Fair Credit, distinguishes Interpretations of the Act. Unofficial Staff Interpretations are simply designated as "No. ——".

[60] See n. 59, *supra.*

"entitled to substantial deference," *Gantt v. Commonwealth Loan Co.,* 573 F.2d 520, 523 (8th Cir. 1978) (referring to Unofficial Staff Interpretations No. 624); usually held valid "unless plainly erroneous or inconsistent with the statute," *Manning v. Princeton Consumer Discount Co.,* 390 F. Supp. 320, 321 (E.D. Pa. 1975), *aff'd.,* 533 F.2d 102 (3d Cir.), *cert. denied,* 429 U.S. 865 (1976) (referring to an Unofficial Staff Interpretation); "entitled to be weighed carefully" and "especially valuable as guides to the Board's understanding of its own regulations or interpretations," *Charles v. Krauss Co.,* 572 F.2d 544, 548 (5th Cir. 1978) (referring to Unofficial Staff Interpretation Nos. 825, 1016 and 1154); "entitled to weight" and "the force with which these least authoritative pronouncements are allowed to press on the judicial scales, however, must vary with the circumstances of each case," *Pollock v. General Finance Corp.,* 552 F.2d 1142, 1144 (5th Cir.) *(on rehearing), cert. denied,* 434 U.S. 891 (1977); and an "expression of . . . principle [that] is persuasive," *Lipson v. Burlington Savings Bank,* 428 F. Supp. 1073, 1078 (D. Vt. 1977) (referring to Unofficial Staff Interpretation No. 1099).

Some courts do not distinguish among the type and source of the interpretation when determining the weight accorded to the interpretation. Official Board Interpretations and Staff Interpretations, presumably both Official and Unofficial, are "entitled to respect." *St. Germain v. Bank of Hawaii,* 573 F.2d 572, 574 (9th Cir. 1977). Regulation Z, Official Board Interpretations and Unofficial Staff Interpretations are "entitled to great weight." *Philbeck v. Timmers Chevrolet, Inc.,* 499 F.2d 971, 976 (5th Cir. 1974). Official Board Interpretations and Unofficial Staff Interpretations are "entitled to great weight, are consistent with the plenary powers granted to the Board, and

are not plainly erroneous. We, therefore, are without authority to overturn these administrative interpretations of Regulation Z and the Act." *Garza v. Chicago Health Clubs, Inc.*, 329 F. Supp. 936, 939 (N.D. Ill. 1971) (referring to a specific Official Board Interpretation, 12 C.F.R. § 226.202 (b), (c) and Unofficial Staff Interpretations dated August 14, 1969 and June 26, 1969).

Courts have also stated that when an Official Staff Interpretation involves an interpretation by an agency of its own regulations, it is "entitled to great weight," but that if the Official Staff Interpretation involves an interpretation of statutory language, "only 'mere deference' is appropriate." *Tarplain v. Baker Ford, Inc.*, 466 F. Supp. 1340, 1347 (D. R.I. 1979).

The absence of a clear and consistent test is responsible, at least in part, for the erratic judicial treatment of agency interpretations. The "due deference" test and its variations are simply no longer meaningful in this complex area and should be replaced by a more certain standard.

(b) *Ill-Defined Concepts of Due Deference Have Contributed to the Disregard of Board Pronouncements*

The profusion of tests that describe the weight to be given to Board pronouncements has allowed many courts to virtually ignore the Board. Illustrative of this problem is the decision in *Pollock v. General Finance Corp.*, 535 F.2d 295 (5th Cir. 1976), *aff'd on rehearing*, 552 F.2d 1142 (5th Cir.), *cert. denied*, 434 U.S. 891 (1977), which declined to follow two Unofficial Staff Interpretations:

> The force with which these least authoritative pronouncements are allowed to press on the judicial scales, however, must vary with the circumstances of each case. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1943). *General Electric Co. v. Gilbert*, 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976). In the present case we are offered two Staff Opinion letters which, far from being contemporaneous with the adoption of § 226.8(b)(5), were in fact procured after the decision of the trial court herein. Furthermore, the views expressed in these letters appear to conflict with the view of the disclosure requirement as to after-acquired property that is manifest in the prior Staff Opinion letter of August 22, 1974. CCH Consumer Credit Service ¶ 31151. Section 226.8(b)(5) itself uses the word "will" rather than "may," *and there is substantial judicial authority for the view that the limitation of Uniform Commercial Code § 9-204(2)(b) must be disclosed. Woods v. Beneficial Finance Co. of Eugene*, 395 F. Supp. 9 (D. Or. 1975). *Johnson v. Associates Finance*, 369 F. Supp. 1121 (S.D. Ill. 1974). Under these circumstances *we decline to give controlling weight to the Staff Opinion letters* of December 30, 1975, and May 28, 1976, and we affirm our earlier holding as to disclosure of the extent of a security interest in after-acquired property.

552 F.2d at 1144-45 (footnote omitted; emphasis added).

In *Pedro v. Pacific Plan*, 393 F. Supp 315 (N.D. Cal. 1975), the court considered whether all insurance disclosures had to be made on the same document as other required disclosures. Following the Fifth Circuit requirement that all insurance disclosures were to be on the single disclosure statement, the court rejected a contrary Staff Opinion Letter.

> Although such correspondences are a "valuable tool" in informing the public of the law's requirements, the opinions contained therein are not binding on this, or any other, court. *It is therefore the opinion of this Court that the purpose of the Truth-*

> *in-Lending Act is better served when all its required disclosures are contained on one side of one sheet of paper.* Whereas the burden imposed upon the creditor is slight, the benefit to the borrowing public is substantial. In the end, the informed use of credit is promoted.

393 F. Supp. at 323 (emphasis added).

Tarplain v. Baker Ford, Inc., 466 F. Supp. 1340 (D. R.I. 1979), is one of the most recent cases to consider and reject Official Staff Interpretation FC-0054 and Unofficial Staff Interpretation No. 1208 regarding disclosure of acceleration clauses. The court stated that although "staff interpretations are entitled to some deference, to the extent that they are inconsistent with the statute, the Court need not follow them." 466 F. Supp. at 1347. The Court, considering *its* view of the statute to be a preferable alternative, rejected both Official and Unofficial Staff Interpretations, after reviewing statutory and regulatory provisions and speculating about consumer knowledge and awareness.

> The average consumer cannot be expected to realize that absent a clause to a different effect, voluntary prepayment is assumed to be the same as involuntary acceleration. *Consequently, the Court concludes that it is not bound by the FRB staff interpretations.*

466 F. Supp. at 1348 (emphasis added).

It is precisely this lip service paid by courts to the Board's interpretations—noting deference, then substituting their own judgment—that has resulted in the confused, discordant state of the law in this area.

In the absence of a clear rule of deference to administrative rulings, the Congressional goal of meaningful, uniform credit cost disclosure is thwarted. Liberal construction of the statute becomes an interpretative mechanism through

which the courts embrace a policy review of each of the Board's pronouncements on an issue-by-issue basis. Conflicting interests must be balanced, but not by second guessing each decision of the Board. The paramount interest is that the consumer be fully and meaningfully informed about the credit transaction. A second, but almost equally important, interest is that creditors be sufficiently certain of their obligations that they are able to structure the disclosures of a credit transaction with confidence that they are in compliance with the law.

In summary, the major problem with judicial treatment of Truth in Lending is that, in the absence of proper deference to Regulation Z and the interpretations of the Board and its Staff, each federal court becomes a super-legislature or a super-administrator, often disrupting and negating the power and authority that Congress entrusted to the Board. A decision imposing disclosure or other requirements that transcend those mandated by the Regulation or interpretations by the Board or its Staff entails a legislative determination under the guise of judicial interpretation.

V. A "PLAINLY ERRONEOUS" STANDARD FOR OFFICIAL INTERPRETATIONS IS CONSISTENT WITH THE LEGISLATIVE HISTORY OF THE ACT AND WITH SOUND ADMINISTRATIVE LAW PRINCIPLES. THE ROLE OF REGULATION Z AND UNOFFICIAL INTERPRETATIONS SHOULD BE CLARIFIED

A. Unless "Plainly Erroneous," Official Board Interpretations And Official Staff Interpretations Should Be Binding On Courts

An Official Interpretation by the Federal Reserve Board or an Official Staff Interpretation by its duly authorized Staff should be binding on a court unless the court finds it

to be plainly erroneous. This approach is consistent with the regulatory scheme envisioned by Congress and is grounded in sound principles of administrative law and judicial economy.

Congress initially granted the Board important interpretative and enforcement powers under the Act, including rulemaking authority. Dissatisfied with the welter of litigation that ensued in 1974 and 1976, Congress authorized the Board to adopt a procedure through which to issue interpretations, and provided that acts that were in good faith conformity with "rules," "regulations," "interpretations" and "approvals" would constitute a defense to civil liability under the Act.

As noted above, Congress intended that the interpretations and approvals authorized by the Congress would be *binding* on the courts in subsequent litigation; not that the courts should merely pay widely divergent degrees of deference to them. The Board, in implementing this Congressional mandate, determined that only Official Board Interpretations and Official Staff Interpretations would be of the stature contemplated by Congress. Thus, these Interpretations, as indicated by the legislative history, must be binding upon the courts until the Interpretation relied upon is reversed by a higher authority.[61] Furthermore, the

[61] *See* text at nn. 51-56, *supra*. The legislative history is consistent with the recognition by several courts that Staff Interpretations are to be considered the opinion of the Board unless the Board rules to the contrary. *See Johnson v. McCrackin-Sturman Ford, Inc., supra*, 527 F.2d at 267, n. 23. That court cited with approval a summary of the applicable rule regarding the weight of Staff opinions:

> A staff opinion represents the informed view of the particular official responding to the inquiry, who is authorized by the Board to

Board has established a specific procedure through which interested parties can seek Board review of positions taken by the Staff in Interpretations.[62]

This Court has stated that when a court interprets an administrative regulation, it must necessarily look to the construction given the regulation by the agency responsible for its promulgation. In *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), this Court stated:

> Since this [case] involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. *But the ultimate criterion is the administrative interpretation, which becomes of control-*

> express opinions on the particular subject. While it is possible that in some instances it might not represent the position which the Board members themselves would take if they formally considered the issue, the Board considers the present informal and flexible procedure, by which members of its staff provide opinions on regulatory provisions, an essential part of its operations.
>
> It is the Board's view that the public is entitled to rely upon a formal staff opinion unless and until it is altered by the Board after formal consideration. Where the issue involves a statement of legal position, it may be assumed that while the question discussed has not been presented to, nor reviewed by the Board, such view is believed by the staff to be legally sound and judicially sustainable, and would be recommended by the staff for Board adoption should the matter be presented to the Board.

FRB Letter No. 444, [1969-74 Transfer Binder] Cons. Cred. Guide (CCH) ¶ 30,640 at 66,283 (Mar. 1, 1971).

See also Gennuso v. Commercial Bank & Trust Co., 566 F.2d 437, 442, n. 13 (3d Cir. 1977); *Sneed v. Beneficial Finance Co., supra*, 410 F. Supp. at 1141, n. 7 (quoting the letter).

[62] *See* n. 15, *supra*.

ling weight unless it is plainly erroneous or inconsistent with the regulation.

325 U.S. at 413-14 (emphasis added).

This rule is uniquely appropriate to the Board and its interpretations of the Act and Regulation Z, and those of duly authorized Staff who issue Official Interpretations pursuant to the Congressional authorization contained in § 130(f). Controlling weight is due these Official Interpretations because of (a) the broad and general nature of the Act, (b) the express delegation of interpretative and enforcement powers by Congress, (c) the technical character of the subject matter, and (d) the fact that there is often little substantial difference among various possible approaches.

The subjects of Official Board and Staff Interpretations involve precisely the kinds of policy decisions that Congress entrusted to the Board by granting such broad powers. As stated in *Bone v. Hibernia Bank*, 493 F.2d 135 (9th Cir. 1974):

> We believe that it is precisely these kinds of policy decisions about the disclosure statement, requiring the weighing and balancing of the various available choices, that Congress entrusted to the Federal Reserve Board by granting it such broad powers. The conclusions thus reached by the Board are based upon its specialized experience and access to information, which is not likely to come to the attention of a particular judge in a given case. While reasonable minds may differ as to which alternative would best suit the purposes of the Act, "courts should defer to the informed experience and judgment of the agency to whom Congress delegated appropriate authority." *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 372, 93 S.Ct. 1652, 1662, 36 L.Ed.2d 318 (1973).[63]

493 F.2d at 140.

The axiom of judicial review that an administrative agency's interpretation of its own regulation has "controlling weight unless it is plainly erroneous," enunciated by this Court in *Bowles v. Seminole Rock & Sand Co., supra*, is especially true in the area of Truth in Lending. Regulation Z and its Official Interpretations incorporate technical administrative expertise and a familiarity with credit practices acquired by the Board and Staff through long experience with the intricacies of this comprehensive regulatory area. When this combination of a highly technical area and administrative expertise exists, *Allen M. Campbell Co. General Contractors, Inc. v. Lloyd Wood Construction Co.*, 446 F.2d 261 (5th Cir. 1971), states:

> [J]udges should be particularly reluctant to substitute their personal assessment of the meaning of a regulation for the considered judgment of the agency. If the agency interpretation is merely one of several reasonable alternatives, it must stand even though it may not appear as reasonable as some other.

446 F.2d at 265. This Court closely circumscribed the available options of a court engaged in the judicial review of an

[63] It is ironic that this lucid expression of the proper role to be played by Board pronouncements was produced by the same Circuit (although by a different panel) whose rejection of Board pronouncements resulted in this case being before the Court. This supplies further evidence that —even within a given Circuit—there exist divergent views as to the weight to be given to the Board's Interpretations. Presumably, this means that the extent to which a creditor in that Circuit can rely on the Board's statements may depend on the composition of the panel that hears its appeal.

administrative interpretation in *American Telephone & Telegraph Co. v. United States,* 299 U.S. 232, 236 (1936):

> This court is not at liberty to substitute its own discretion for that of administrative officers who have kept within the bounds of their administrative powers.

See also this Court's statement in *Udall v. Tallman,* 380 U.S. 1, 16 (1965).

Despite the consistent recognition by this Court of the need for judicial deference to administrative pronouncements, the courts in applying the Act and Regulation Z have disregarded or given a perfunctory nod to Official Board and Staff Interpretations. To avoid continued confusion and needless litigation, the Court should adopt the unmistakable rule that these Interpretations are binding upon the courts unless they are *plainly erroneous.*

B. The Confused Status Of Regulation Z Should Be Clarified

As discussed above, various courts have felt free to add disclosure requirements to Regulation Z, have imposed disclosure requirements contrary to the express provisions of Regulation Z and have rejected the binding nature of Regulation Z. These decisions are clearly contrary to this Court's pronouncements in *Mourning* and *Usery* and the views of respected commentators.[64] The doubt created by these contradictory cases should be dispelled by a clear enunciation that Regulation Z is a legislative rule and that it is as *binding* on a reviewing court as a statute, so long as it is adopted in accordance with appropriate procedural requirements and is reasonably related to the purposes of the Act.

[64] *See* text at pp. 34-35, *supra.*

C. Unofficial Staff Interpretations Should Be Accorded "Great Deference" By The Courts

Much confusion surrounds the weight to be accorded Unofficial Staff Interpretations by the courts and the degree of reliance that creditors may place on them. This confusion should be resolved by modifying the standard of judicial review to provide that courts must give "great deference" to Unofficial Staff Interpretations. This test has already found favor with some courts.[65]

Unofficial Staff Interpretations provide creditors with a major source of guidance in complying with the requirements of the Act and Regulation Z. In addition to easing the creditor's compliance burden, as contemplated by the 1974 and 1976 amendments, these interpretations advance the goal of formulating a uniform national policy and a uniform national disclosure standard. Varying degrees of deference and the multiple formulations of this traditional test have rendered the "due deference" test meaningless and have undermined the ability of creditors to rely upon Unofficial Staff Interpretations.

Reviewing courts must be given a clear and consistent rule for determining the weight of Unofficial Staff Interpretations. For a court to disregard such an interpretation, the court should have to find more than that the interpretation appears to be unwise or burdensome or inferior to another. As the Court stated in *American Telephone & Telegraph Co. v. United States, supra,* 299 U.S. at 236-37: "What has been ordered must appear to be 'so entirely at

[65] *See Harvey v. Housing Development Corp., supra,* 451 F. Supp. at 1206; *Gantt v. Commonwealth Loan Co., supra,* 573 F.2d at 523; *Philbeck v. Timmers Chevrolet, Inc., supra,* 499 F.2d at 976; *Johnson v. McCrackin-Sturman Ford, Inc., supra,* 527 F.2d at 267, n. 23; and *Gennuso v. Commercial Bank & Trust Co., supra,* 566 F.2d at 442, n. 13.

odds with fundamental principles of correct [activity]' as to be the expression of a whim rather than an exercise of judgment.'' As a critically important element of the overall regulatory scheme, the role of Unofficial Staff Interpretations should be recognized by this Court. The courts should be admonished to give these pronouncements *great deference*, rather than the superficial lip service that has characterized the judicial reception to date.

VI. IN DEFERENCE TO THE PROPER ROLE OF OFFICIAL STAFF INTERPRETATIONS, THE DECISION BELOW SHOULD BE REVERSED

Applying the appropriate rule to the case before the Court, the Official Staff Interpretation governing the instant case should be followed and the decision below should be overturned. Under Official Staff Interpretation No. FC-0054, a creditor who pursues a rebate policy that is the same, whether prepayment occurs before or after acceleration, need disclose only its uniform method of making rebates. In this case, both the Petitioners' disclosures and practices follow the dictates of that Official Interpretation and, since the Interpretation falls within the Act, it cannot possibly be said to be "plainly erroneous." The practice pursued by the Petitioners is clearly "in conformity" with the Official Interpretation.

The Ninth Circuit, in the case relied upon by the court below, specifically failed to acknowledge the appropriate status of this pronouncement. Disregarding this Official Interpretation, the court improperly substituted its judgment for that of the Board. The reasoned decision reflected in the Official Interpretation should not be overruled by a court adopting its own version of the regulatory requirements.

The Official Staff Interpretation should be upheld, and the Petitioners' practices in conformity with that Interpretation should be acknowledged as being in compliance with the Act. The decision of the Ninth Circuit should be reversed.

CONCLUSION

Basic concepts of fairness and judicial efficiency, as well as unmistakable Congressional intent, require that the Federal Reserve Board be recognized as the interpretative and administrative source of requirements under the Act in order to provide the single, uniform set of rights and obligations for creditors and consumers alike. The legal disarray presented in this case is merely illustrative of the confusion surrounding the application of the many technical requirements created by the Act. Only through the Court's clear acknowledgment of the role ascribed to the Board by Congress will the Board be encouraged to act, thus reducing the tidal wave of litigation under the Act that has given rise to exorbitant judicial and economic costs.

Respectfully submitted,

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In the Supreme Court of the United States

October Term, 1979

No. 78-1487

Ford Motor Credit Company, *et al.*,
Petitioners,
v.
Dennis Milhollin, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief for the California Bankers Association As Amicus Curiae

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Brief for the California Bankers Association As Amicus Curiae

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The California Bankers Association, pursuant to Rule 42 of the Rules of this Court and with the consent of all parties,[1] respectfully submits this brief *amicus curiae*. The Association urges that the judgments in these consolidated cases of the United States Court of Appeals for the Ninth Circuit be reversed.

1. Copies of the parties' consents to submission of this brief have been filed with the Clerk of this Court.

STATEMENT OF THE CASE AND INTEREST OF AMICUS CURIAE

In these cases, consolidated for decision below and for review in this Court, the Ninth Circuit upheld the conclusion of the District Court for the District of Oregon that, in connection with their consumer credit contracts with the respondent debtors, petitioners had violated the disclosure requirements of the Truth in Lending Act (the "Act"), 15 U.S.C. § 1638(a), and of the Federal Reserve Board's Regulation Z, 12 C.F.R. § 226.8(b), promulgated thereunder. In so doing, the Ninth Circuit reaffirmed its previous decision in *St. Germain v. Bank of Hawaii,* 573 F.2d 572 (9th Cir. 1977), that a creditor's acceleration of indebtedness upon default, although not among the credit terms specifically subject to disclosure under the Act or Regulation Z, is a "prepayment" within the meaning of Regulation Z, 12 C.F.R. § 226.8(b)(7). Accordingly, under the Ninth Circuit's ruling, creditors are obliged to include in the disclosure statement required by the Act a statement as to whether, in the event of acceleration, unearned finance charges will be rebated and, if so, how the amount of unearned finance charges will be computed. Failure to have made these disclosures will subject petitioners to the civil penalties imposed by the Act, costs of the action and attorneys' fees, without regard to whether their failure caused respondents any harm at all.

The California Bankers Association, a trade organization formed in 1891 to promote the study and discussion of commercial banking problems, includes among its members all but one of California's two hundred fifty-one commercial banks, ranging from among the nation's largest to small community banks. The Association's members all engage

in the extension of consumer credit.[2] In such transactions, each bank is subject to the Truth in Lending Act's requirements.

For the Association and its members, the primary significance of these cases does not lie in the particular Truth in Lending issue they present, *i.e.,* in whether, as a result of the Court's decision, Association members and other creditors will or will not have to include acceleration clauses in their Truth in Lending Act disclosures. The Association's members have no objection to making disclosure of acceleration clauses or, indeed, most other particular credit terms. The problem for the Association's members and, we believe, for all lenders who attempt in good faith to comply with the Act lies, rather, simply in knowing what must—and must not—be disclosed. The problem is exemplified by these cases. As petitioners have explained, both in their petition and in their opening brief to this Court, the Ninth Circuit's position on the acceleration clause issue —a position predicated on the court's interpretation of Regulation Z rather than on any purported conflict between the Regulation and the Truth in Lending Act itself—differs from the Federal Reserve Board's own interpretation of the Regulation, as expressed in Official Staff Interpretation No. FC-0054 [42 Fed. Reg. 18056 (March 21, 1977)] and Public Information Letter No. 1208 [(September 9, 1977), [1974-1977 Transfer Binder] Cons. Cred. Guide (CCH) ¶ 31,696]. Moreover, the Ninth Circuit's position differs from the various positions taken on the issue by

2. As of June 30, 1978, the Association's members held over $16.6 billion of the $124 billion of outstanding consumer loans extended by the nation's commercial banks. Federal Deposit Insurance Corporation, Assets and Liabilities, Commercial and Mutual Savings Banks—June 30, 1978, at 40-41 (1979); Fed. Reserve Bull., Jan. 1979, at A42, Table 1.55.

other Circuits, positions that themselves differ, in varying ways and degrees, from the position of the Board and, indeed, from each other.

The problem of conflict in identifying what credit terms are subject to Truth in Lending Act disclosure attaches not only to the acceleration clause issue presented here, but to other disclosure issues as well. The problem has impeded Truth in Lending compliance efforts throughout the Act's ten-year history. With the proliferation of Truth in Lending litigation and judicial decisions, the problem has assumed critical proportions, making compliance with the Act difficult, expensive, and uncertain. It has led, moreover, to a process of accretion in the information required to be disclosed, as judicial decisions add more and more terms to the required disclosure list. This process at once increases the difficulties of compliance and, at the same time, works to defeat the statutory goal of highlighting to the consumer those credit terms that have central significance to his credit purchasing decision.

The Court's decision in these cases presumably will resolve the conflict that now exists on the acceleration clause issue. But the Court's decision can, and in the Association's view should, be directed to ameliorating the general problems of conflict and accretion that have plagued compliance with the Truth in Lending Act from its inception. This Court cannot resolve every Truth in Lending conflict among the courts, and between the courts and the Federal Reserve Board. Even if it could, the delay before this Court could act would itself be attended by confusion and uncertainty as to what the Act requires. It has been, for instance, seven years since the first district court decision that acceleration disclosure was required; those seven years have been marked by confusion and by subjection of the credit-granting industry to numerous lawsuits on this single issue

alone. Accordingly, for the Association and its members, the critical significance of these cases lies in the opportunity they present the Court to articulate a standard of review in Truth in Lending cases that will, in the future, assist in preventing the proliferation of uncertainty about what the Act requires.

General judicial review principles, which this Court already has applied to Truth in Lending Act adjudication in *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 365 (1973), properly compel the courts to accede, in Truth in Lending Act civil enforcement actions, to the Federal Reserve Board's judgments as to the scope and content of required disclosure, unless the interpretations are plainly erroneous because contrary to Congress's intent. This standard of review finds support not only in administrative law principles, but in the Congressional purposes evinced in the Act's legislative history and in the need for uniformity both to achieve the Act's purposes and to avoid unfairness to those subject to it. To inform the Court of these general problems and of the necessity of strict deference to Federal Reserve Board judgments, the Association respectfully submits this brief. Because the Ninth Circuit failed to pay the required deference to the Board's interpretation of Regulation Z, the Association believes that the judgments below should be reserved.

SUMMARY OF ARGUMENT

The Truth in Lending Act's purpose is, in concept, straightforward. Congress's intent was to foster consumer awareness of the most significant terms of credit contracts, thus helping both to ensure that consumers will make informed decisions before incurring credit obligations and to allow consumers more readily to judge between compet-

ing credit offers. This intent is expressed in the statute itself:

> It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit . . . .

15 U.S.C. § 1601.[3] To achieve these objectives, the Act requires creditors to disclose formally, in a statement given the consumer, certain specific terms in the underlying credit contract—in particular, those expressing basic price or principal, finance and other charges, and the finance charge expressed as an annual percentage rate. To ensure compliance with the Act, Congress provided that failure to make the required disclosures would render the creditor liable to the consumer for actual damages, if any, for the costs of suit, including attorney's fees, and for civil penalties of up to $1,000 in an individual action and $500,000 in a class action, without regard to whether, as a result of the failure, the consumer was in fact unaware of the credit terms or suffered any specific injury. 15 U.S.C. § 1640.

Congress recognized, however, that the purposes of the Act, although straightforward in concept, would be difficult in execution, given the myriad forms in which credit transactions can take place and the multitude of credit terms that arguably have some bearing on credit costs and on the consumer's decision. In addition, Congress recognized that the Act's purposes could be achieved only if the disclosures it required could be, across the universe of consumer credit transactions, both uniform and uniformly

3. *See* H.R. Rep. No. 1040, 90th Cong., 1st Sess. 13 (1967), *reprinted in* [1968] U.S. Code Cong. & Ad. News 1970.

focused on the most critically significant credit terms. H.R. Rep. No. 1040, 90th Cong., 1st Sess. 13 (1967), *reprinted in* [1968] U.S. Code Cong. & Ad. News 1970. For these reasons, Congress relied, in Section 105 of the Act, on the expertise of the Federal Reserve Board to create a detailed regulatory regime to achieve the Act's purposes. 15 U.S.C. § 1604.

Despite this, however, and despite this Court's recognition in *Mourning v. Family Publications Service, Inc., supra,* of the centrality of the Board's role in the scheme of the Act, the history of the Act's enforcement has been marked by conflicts as to what disclosures are required—conflicts that result in confusion, unfairness to creditors, and the substantial defeat of the Act's central objectives. Part I below details a part of this history, together with the consequent problems of compliance it has posed for creditors. This history demonstrates the necessity of returning to the administrative law principle recognized by this Court in the *Mourning* case. In brief, as Part II below explains, fair and efficient enforcement of the Act requires that courts defer to the Federal Reserve Board's judgments, expressed in Regulation Z and in Board and staff interpretations, as to the precise scope of the Act's disclosure obligations, unless the Board's judgments are plainly erroneous because in clear and direct conflict with demonstrable Congressional intent.

ARGUMENT

I. By Refusing to Defer to Federal Reserve Board Interpretations, the Courts Have Substantially Contributed to the Difficulties and Costs of Truth in Lending Compliance.

A. THE ACT IS COMPLEX AND THE CONSEQUENCES OF NON-COMPLIANCE ARE SEVERE.

The problems creditors have faced in complying with the Truth in Lending Act are founded in substantial measure

on the inevitable complexity, in application, of the law itself and of its implementing regulations. The credit contract, of course, contains all of the terms of the relationship between the creditor and the consumer. Regulation Z requires, however, that the specific terms that are to be disclosed must appear together on the same side of a single page. 12 C.F.R. § 226.8(a). Accordingly, creditors must carefully choose which of the many terms in a multi-page contract are to be extracted from the contract and placed together on the single page that includes the federal disclosure statement. To preserve logical continuity in the contract itself, consumers may actually have key contract terms disclosed to them twice, once in the formal disclosure, again in the body of the contract. In addition to such locational requirements, Regulation Z imposes highly detailed substantive requirements (*see, e.g.,* 12 C.F.R. § 226.8(e)), mandatory vocabulary for identification of credit terms (*see, e.g.,* 12 C.F.R. § 226.8(c)), and even requirements for the size of type in which the terms are to be printed (12 C.F.R. § 226.6(a)).

Any variance from or technical violation of the elaborate requirements of the Act and of Regulation Z can result in a debtor's invocation of the statutory penalties. Indeed, the penalties have been applied even when the creditor's departure from the requirements has been evidently trivial.[4] Moreover, since lenders almost universally use

4. *See, e.g., Houston v. Atlanta Federal Sav. & Loan Ass'n.,* 414 F. Supp. 851, 858 (N.D. Ga. 1976), in which the court found that the creditor's failure to fill in the borrower's city and state of residence in the disclosure statement was a violation of Regulation Z; *Powers v. Sims and Levin Realtors,* 396 F. Supp. 12, 19 (E.D. Va. 1975), *aff'd on other grounds,* 542 F.2d 1216 (4th Cir. 1976), in which the use of the term "total finance charges" instead of the required "finance charge" was held to be a violation of Regulation Z. *See also Ratner v. Chemical Bank New York Trust Co.,* 54 F.R.D. 412, 416 (S.D. N.Y. 1972).

preprinted forms, a single court decision finding a form in noncompliance has the practical effect of exposing the creditor to liability on each of its outstanding consumer loans, possibly numbering in the thousands.[5]

This potential liability is more than theoretical. Since 1972, more than 11,500 Truth in Lending actions have been filed in federal courts.[6] Because a claim can be made, and penalties recovered, without regard to whether the alleged violation caused the debtor any harm, few of the cases have involved debtors who were dissatisfied either with the disclosure provided them or even with the terms of the credit; indeed, it appears that, in many of the cases, Truth in Lending claims were filed to avoid the obligations of the debt or to force resolution of a dispute concerning the products or services purchased with the credit. Landers, *Some Reflections on Truth in Lending,* 1977 U. ILL. L. FORUM 669, 677. Moreover, the enormous volume of Truth in Lending suits substantially understates the effect that potential liability has had on creditors. The potential expense of litigation and of possible penalties and counsel's fees, multiplied by the threat of class actions, almost certainly has resulted in creditors choosing to settle thousands of additional claims before suits were filed. Landers, *supra,*

5. If individual actions are brought, the lender might be required to pay the statutory penalty in each, with maximum potential liability limited only by the number of such possible actions. The Act limits maximum class action recoveries to the lesser of $500,000 or one percent of the creditor's net worth. 15 U.S.C. § 1640(a)(2)(B).

6. WASHINGTON CREDIT LETTER, Nov. 13, 1978, at 3. At one juncture, in 1974, Truth in Lending actions made up 36.8% of all cases filed in the Northern District of Georgia. *Qui Tam and Federal Reserve Board Procedures: Hearings on S.3008 Before the Subcomm. on Consumer Affairs of the Senate Comm. on Banking, Housing, and Urban Affairs,* 94th Cong., 2nd Sess. 416 (1976) (statement of W. Rhett Tanner, Jr.).

at 680-81. *See Mirabal v. General Motors Acceptance Corp.*, 576 F.2d 729, 731 (7th Cir.), *cert. denied*, 99 S. Ct. 642 (1978).

The problems of compliance, in short, have generated substantial costs—costs that creditors inevitably must pass through, at least in part, to the public. To a substantial extent, as noted above, these costs result from the complexity of Truth in Lending Act requirements and from the rule of strict liability the Act creates. But to an equally substantial extent, the costs result from the uncertainty of the law, an uncertainty to which the courts have been prime contributors.

B. JUDICIAL DECISIONS HAVE UNDERCUT CONGRESS'S AND THE FEDERAL RESERVE BOARD'S EFFORTS TO ACHIEVE CLARITY AND UNIFORMITY IN THE LAW.

From the earliest days following passage of the Act, the Federal Reserve Board took affirmative steps to carry out the Congressional directive that it facilitate Truth in Lending compliance. In particular, the Board established an elaborate system to provide advisory letters and staff interpretations attempting to clarify compliance technicalities. Since 1968, the Board has issued 58 official Board interpretations of the Act and Regulation Z, 166 official staff interpretations and more than 1,300 public information letters. These promulgations in themselves have added complexity to the law. But through them the Board has attempted to foster an ingredient essential to effective enforcement and compliance—certainty as to the law's requirements. Through these various devices, the Board has attempted to address Truth in Lending issues from a national perspective, and to allow lenders to secure direction in areas of potential doubt. The Board's efforts have been an integral part of a national and uniform compliance system.

This system, however, is suffering significantly from a steady erosion caused by judicial opinions that have both added requirements to the Act and contradicted Board promulgations. In adjudicating debtors' Truth in Lending claims the courts have varied significantly in the degree of deference given Board or Board staff interpretations. Staff interpretations, for example, have been termed merely "persuasive," *Lipson v. Burlington Savings Bank*, 428 F. Supp. 1073, 1078 (D.Vt. 1977). Other courts have said that they deserve "respect," *Griffith v. Superior Ford*, 577 F.2d 455, 458 (8th Cir. 1978); plain "deference," *McDaniel v. Fulton National Bank*, 571 F.2d 948, 950 (5th Cir.), *reh. denied with explanatory opinion*, 576 F.2d 1156 (5th Cir.), *panel opinion after remand*, 578 F.2d 1185 (5th Cir. 1978); "great weight," *Anthony v. Commercial Loan & Investment Corp.*, 559 F.2d 1363, 1367 (5th Cir. 1977); and, finally, "great deference," *Philbeck v. Timmens Chevrolet*, 499 F.2d 971, 977 (5th Cir. 1974). As a result of these varied and often loose standards of deference, courts frequently have resolved Truth in Lending issues contrary to apparently clear Board and staff directives. Apart from making the Board's interpretations unreliable indicators of what is required, the courts have also made the Board's list of disclosure obligations incomplete, adding new terms to the list of those that, under the Board's directives, are the only terms that must be disclosed.

The acceleration issue presented in these cases exemplifies both processes—uncertainty and accretion—at work. Prior to the decision in *Garza v. Chicago Health Clubs, Inc.*, 347 F. Supp. 955 (N.D. Ill. 1972), no reasonable creditor could have concluded that the Truth in Lending Act required inclusion, in the Truth in Lending disclosure statement, of acceleration clauses or of the possible consequences

of acceleration on the amount of finance charges paid. Nowhere in the Act or Regulation Z were acceleration clauses even mentioned, much less was there any requirement regarding their disclosure. Yet, beginning with *Garza,* some courts have managed to create, from the language of the Act or Regulation Z, some basis for including acceleration clause information among the required disclosures, and, concomitantly, have found lenders liable for having failed to predict the courts' creativity on the issue. Other courts, however, have taken the position that disclosure is required only of those credit terms specifically listed in the statute and regulation, and, accordingly, have refused to include acceleration clauses among the Act's disclosure obligations. *E.g., Griffith v. Superior Ford,* 577 F.2d 455 (8th Cir. 1977); *Begay v. Ziems Motor Co.,* 550 F.2d 1244 (10th Cir. 1977). In 1974, the Federal Reserve Board broke its previous silence on the subject. The Board staff indicated that the law required the creditor to disclose the acceleration clause only if the creditor did not rebate unearned finance charges in accordance with rebate provisions applicable to other prepayments. Federal Reserve Board Public Information Letter No. 851 (Oct. 22, 1974), [1974-1977 Transfer Binder] CONS. CRED. GUIDE (CCH) ¶ 31,173. Subsequently, some courts have adopted the staff's interpretation; others, including the Ninth Circuit here, have not. In consequence, for the last seven years, lenders have had no single rule to follow on this issue.

The accretion in the disclosure requirements resulting from imaginative judicial interpretations is by no means unique to the acceleration issue. Examples are numerous. Indeed, the proliferation of uncertainty as to the proper

disclosure of security interests, for instance, is, if anything, even more severe. The requirements of Regulation Z with respect to security interests are, on their face, simple enough. The creditor is required to disclose the type of security interest, the property to which it relates, whether after-acquired property will be subject to the interest, and whether other or future indebtedness is to be secured. 12 C.F.R. § 226.8(b)(5). But despite the Regulation's relatively limited and straightforward disclosure obligations, some courts have required additional, increasingly sophisticated and complex disclosures, incuding (1) the limitation under Uniform Commercial Code Section 9-204[7] on security interests in after-acquired consumer goods,[8] and (2) any waiver of homestead exemptions.[9] In adding complexity to the security interest disclosure requirements, the courts once again have not paid sufficient deference to the position of the Federal Reserve Board and its staff on the issue of what constitutes sufficient disclosure.

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7. The Uniform Commercial Code has been adopted in forty-nine states.

8. *Basham v. Finance American Corp.*, 583 F.2d 918 (7th Cir.) *cert. denied,* 99 S.Ct. 1046 (1978); *Pollock v. General Finance Corp.*, 535 F.2d 295 (5th Cir. 1976), *cert. denied,* 434 U.S. 891 (1977). *Contra, Interlakes Financial Corp. v. Payne,* 401 N.Y.S.2d 713 (1978); *In re Dickson.* 432 F. Supp. 752 (W.D.N.C. 1977). Federal Reserve Board Public Information Letter No. 1053 (May 28, 1976), [1974-1977 Transfer Binder] CONS. CRED. GUIDE (CCH) ¶ 31,393; Federal Reserve Board Public Information Letter No. 983 (Dec. 30, 1975), [1974-1977 Transfer Binder] CONS. CRED. GUIDE (CCH) ¶ 31,323.

9. *Lamar v. American Finance System of Fulton County, Inc.,* 577 F.2d 953 (5th Cir. 1978); *Elzea v. Nat'l Bank of Georgia,* 570 F.2d 1248 (5th Cir. 1978).

C. THE COURT'S DECISIONS IMPAIR THE EFFECTIVENESS OF THE ACT AND CONTRIBUTE SUBSTANTIALLY TO THE DIFFICULTIES OF COMPLIANCE.

The process of accretion that the acceleration clause and security interest cases exemplify goes a substantial way toward defeating a central purpose of the Truth in Lending Act. Some courts, viewing each purported failure to disclose in isolation, see the nondisclosed term as having possible significance to consumer decisions—as almost all credit terms, in some circumstances, do—and accordingly conclude that it would be desirable to include it in the disclosure.[10] In so acting, the courts fail to appreciate that Congress intentionally limited the disclosure requirements of the Act, and that the limitation was essential to the Act's purpose: to provide consumers with clear, conspicuous disclosure of specifically selected, especially significant, credit terms in order to promote intelligent consumer choice. The judicial decisions result, through the accumulation of new requirements, in a radically different approach, in effect requiring disclosure of "all relevant factors" rather than specific terms of particular significance. *See* Landers, *supra,* at 674. Far from contributing to intelligent choice, the prolixity of the disclosure may result in an "information overload," substantially defeating Congress's aim. Senator William Proxmire, a sponsor of the original Act and of major pending Truth in Lending Act amendments, has observed that "[d]isclosure statements have grown increasingly detailed to a point where, instead of being concise and understandable, they are liable to be 2 feet long." 123 CONG. REC. S6020

10. Most frequently, the courts have devised different disclosure requirements by interpreting specific existing disclosure requirements. Some courts have gone so far as to simply find that the general purposes of the Act require an additional disclosure. *See, e.g., Woods v. Beneficial Finance Co.,* 395 F. Supp. 9 (D. Ore. 1975).

(daily ed. Apr. 20, 1977).[11] Governor Philip Jackson, at the time Chairman of the Board's Consumer Affairs Committee, recently testified to the effect that a reduction of disclosures was important to focus consumer attention and achieve the purpose of the Act.[12]

The conflicts among the varying interpretations of the courts and the Board that accompany this process of accretion also impair the Act's effectiveness. Creditors preparing Truth in Lending statements must, in a never-ending process, continually evaluate the decisions of hundreds of district courts and the courts of appeals in eleven different circuits, state court decisions, as well as hundreds of Federal Reserve Board and Board staff interpretations. As a practical matter they must respond with alterations in disclosure patterns whenever any of these sources so dictates. Absent a single source of guidance, the creditor is harmed, as is the consumer, since the statutory goal of uniformity in presentation, allowing ready consumer comparison of significant credit terms, is lost.

For the creditor, the process of accretion and the confusion in interpretation have significant costs even apart from the potential liabilities they create. Continually monitoring the multiple sources of authority for each highly technical change is in itself enormously expensive; it requires the

11. The "information overload" problem, among other factors, has generated congressional efforts to simplify the Act's requirements. *See* S. 108, 96th Cong., 1st Sess. The Senate passed the bill on May 1, 1979. 125 CONG. REC. S4990 (daily ed. May 1, 1979). In his remarks, Senator Garn observed that "disclosure forms had become too lengthy and complex for consumer understanding or utility." *Id.* S4989.

12. *Simplify and Reform the Truth in Lending Act: Hearings on S. 1312, S. 1501, and S. 1653 Before the Subcomm. on Consumer Affairs of the Senate Comm. on Banking, Housing, and Urban Affairs,* 95th Cong., 1st Sess. 16-17 (1977) (statement of Philip C. Jackson, Governor, Board of Governors of the Federal Reserve System).

services of professionals who are highly trained in this narrow and complex field. The frequency and cost of change are great. One national creditor—General Motors Acceptance Corporation—estimated that it alone made more than 1,400 amendments to its disclosure forms between 1968 and 1977.[13] With each judical addition to the disclosure list, forms prepared in compliance with old requirements must be discarded and new forms printed; a single such change, made to comply with the new requirement of a single court of appeals in credit transactions throughout the circuit, can cost several million dollars.[14] The costs to society, in short, are immense.

The judicially produced transformation of the system envisaged by Congress affects all creditors, but its impact on the thousands of small banks and credit unions throughout the United States is especially severe. They are without the resources to comply. The volume and value of transactions in which they engage are too small in comparison with those of their larger competitors to absorb the high fixed cost of compliance. They are placed in a double bind: they must either incur what may be ruinous costs of compliance, or risk the consequences of ruinous liability if they do not.

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13. General Motors Acceptance Corp. has testified before Congress that since the effective date of the Truth in Lending Act and Regulation Z, the company has spent more than $3 million to accomplish these form changes. *Oversight Hearings on the Simplification of the Truth in Lending Act Before the Subcomm. on Consumer Affairs of the House Comm. on Banking, Finance and Urban Affairs,* 95th Cong., 2d Sess. 558 (1978) (statement of General Motors Acceptance Corp.).

14. According to Robert Evans, general counsel to the National Consumer Finance Association, one circuit decision engrafting a new requirement onto Regulation Z can cost between $3 million and $6 million. *Hearings, supra* note 13 at 217.

Finally, even creditors who can afford to keep abreast of changing requirements face a serious dilemma. In normal circumstances, persons subject to evolving legal requirements can, with advice of counsel, attempt to minimize risk by going beyond what the law appears at present to require; they can attempt, in short, to predict what might be required in the future and then act on their prediction. But in the Truth in Lending area, this course itself poses substantial risks. Voluntary change, when the law is unclear, may suggest to potential litigants that past practices were in violation. Even more importantly, too much disclosure can itself be a violation of the Act and of Regulation Z. 12 C.F.R. § 226.6(c). Accordingly, if a creditor discloses information apart from that required by existing regulations and court decisions, he may be found liable if, in the end, a court determines that such disclosure was not mandated and that the "over-disclosure" may contribute to consumer confusion. *See, e.g., La Grone v. Johnson,* 534 F.2d 1360, 1362 (9th Cir. 1976).

D. THE PROBLEMS OF COMPLIANCE REMAIN DESPITE CONGRESS'S EFFORTS TO PROMOTE FAIRNESS AND UNIFORMITY IN THE ACT'S ENFORCEMENT.

In amendments to the Act, Congress has attempted to address some of the problems of compliance described above. Thus, in 1974, Congress added to the Act a new Section 130(f), providing that no liability would attach

> to any act done or omitted in good faith in conformity with any rule, regulation or interpretation thereof by the Board, notwithstanding that after such act or omission has occurred, such rule, regulation, interpretation, or approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

Pub. L. No. 93-495, § 406, 88 Stat. 1518 (1974). In so amending the Act, Congress intended to relieve creditors from liability for following official Board decisions with which courts subsequently disagreed:

> The Truth in Lending Act is highly technical and the committee does not believe a creditor should be forced to choose between the Board's construction of the Act and the creditor's own assessment of how a court may interpret the Act.

S. Rep. No. 279, 93rd Cong., 1st Sess. 13 (1973).

The "good faith" defense of the 1974 amendments applied, however, only to reliance on Regulation Z itself or on official Board decisions. The defense did not apply to reliance on staff opinions and interpretations, even though they have been the primary means through which the Board has tried to promote clarity in the requirements of the law. In 1976, in response to requests by creditors unable to discern how to comply with the Act,[15] Congress amended Section 130 (f) to provide that no liability would apply if the creditor acted in good faith and

> in conformity with any interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the Board to issue such interpretations or approvals under such procedures as the Board may prescribe therefor . . . .

15 U.S.C. § 1640(f).[16]

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15. *See* 122 Cong. Rec. 2852 (1976) (remarks of Rep. Annunzio).

16. One of the driving forces behind the amendments was the concern over small business compliance. As stated by Congressman Wylie:

> This provision should be especially helpful to small businesses, which cannot afford that expensive legal talent which is often required to enable them to cope with the intricacies of this Act.

122 Cong. Rec. 2852 (1976). A similar concern was expressed in the Senate, 122 Cong. Rec. 2836 (1976) (remarks of Sen. Garn).

Thus, Congress has attempted to facilitate compliance by allowing creditors a defense if they rely in good faith on either Board or staff interpretations, even if the courts subsequently find the interpretations invalid. But Congress's efforts, important as they are in furthering clarity of the law and effective, uniform compliance, leave creditors open to continuing risk in Truth in Lending cases. The 1974 and 1976 amendments provide no protection, for example, from a court ruling that adds a new disclosure requirement to those previously articulated by the Board, unless the Board (or staff) expressly has stated that such disclosure is *not* required.[17] The Board most frequently states positively what must be disclosed, rarely what need not be disclosed. Moreover, courts can continue to find Board and staff interpretations wrong. If so, the creditor before the court may invoke the good faith defense. But it is unclear whether other creditors, in subsequent credit transactions, can continue to rely "in good faith" on a Board interpretation found, by some court somewhere, to be erroneous. No court, to our knowledge, has yet ruled on this point, and, accordingly, the confusion resulting from conflicting court and board interpretations continues to impair both creditor compliance and the Act's effectiveness.

II. Courts Should Adhere to the Board's Interpretations of Both the Scope and the Content of the Act's Requirements Unless Clearly Contrary to Congressional Intent.

The Association believes that the impediments, described above, to compliance with and effective implementation of

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17. *See, e.g., Jones v. Community Loan & Investment Corp.*, 526 F.2d 642 (5th Cir.), *rev'd*, 544 F.2d 1228 (5th Cir. 1976) (*en banc*), *cert. denied*, 431 U.S. 934 (1977). *See also, St. Germain v. Bank of Hawaii*, 573 F.2d 572 (9th Cir. 1977); *Pollock v. General Finance Corp.*, 552 F.2d 1142, 1144 (5th Cir.), *cert. denied*, 434 U.S. 891 (1977); *Ives v. W. T. Grant Co.*, 522 F.2d 749, 758 (2d Cir. 1975).

the Truth in Lending Act could have been diminished substantially had the courts, including the Ninth Circuit in these cases, paid proper deference to the decisions of the Federal Reserve Board. In adjudicating Truth in Lending cases, creditors should be held liable only if their disclosure statements fail to comply with the specific terms of Regulation Z and with interpretations of the Regulation by the Board and its staff, unless either the Regulation or the Board's interpretation of it is plainly erroneous because manifestly contrary to the intent of Congress. Indeed, in the *Mourning* case, this Court already has recognized such a role as consistent with that Congress intended the Board to play, with the judicial review principles that follow from it, and with fair and effective achievement of the Act's goals.

A. CONGRESS INTENDED THAT THE BOARD ACT AS THE SOURCE OF UNIFORM INTERPRETATION OF THE ACT'S REQUIREMENTS.

In *Mourning v. Family Publications Service, Inc.*, this Court's only previous Truth in Lending case, the Court gave full recognition to the central role Congress gave the Federal Reserve Board in order to achieve the Act's remedial purposes. At issue in *Mourning* was the Board's "four installment rule," which made the Act's disclosure requirements applicable to any obligation payable in more than four installments, and thus significantly expanded the Act's express coverage. The Court stated that Section 105, delegating rulemaking authority to the Board, gave the Board "broad authority . . . to render the Act effective." 411 U.S. at 365.

The broad authority of Section 105 was intended, however, not only to deal with the kind of "attempted evasion" at issue in *Mourning*, but to achieve other purposes as well. In particular, the legislative history demonstrates that Congress delegated authority to the Board in order to

achieve uniformity in the Act's application. Thus, the Conference Report focused on uniform application of the Act's requirements to all competitors in the highly fragmented credit industry and stated that, to achieve this end, the Act would vest "sole rulemaking power . . . in the Board of Governors . . . ." CONF. REP. No. 1397, 90th Cong., 2d Sess. 26 (1968), *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2023. The Act itself makes it clear that uniformity is essential to the Act's purpose; disclosure was to be in a uniform format, using a uniform vocabulary and uniform computational methods, "so that the consumer will be able to compare more readily the various credit terms available to him . . . ." 15 U.S.C. § 1601.

Moreover, as explained in detail above, the central role of the Board was, in Congress's view, essential to allow creditors readily to comply with the Act, and to make it possible fairly to impose the stringent statutory penalties for noncompliance. This Court, in *Mourning*, recognized the force of this point. The Court rejected an attack based on the "penal" consequences of the Board's rule, in part, at least, because the rule was "explicit" and so gave clear warning of what was required. 411 U.S. at 375. In the 1974 and 1976 amendments to the Act, Congress reinforced the central role it intended the Board to play. Generated by Congress's concern over the confusion evident in the courts' development of Truth in Lending Act requirements, the purpose of the amendments was to give "binding" force to the interpretations of the Board and its staff. *See, e.g.*, 122 CONG. REC. 2836-37 (1976) (remarks of Senators Proxmire and Garn). The amendments' legislative history thus reaffirms Congress's original intent that the Board and its staff be looked to as the source of nationally uniform standards of Truth in Lending disclosure requirements.

B. ACHIEVEMENT OF THE ACT'S PURPOSES REQUIRES THAT COURTS ADHERE TO THE DEFINITION OF THE ACT'S REQUIREMENTS AS FORMULATED BY THE BOARD AND ITS STAFF.

To fulfill the role Congress assigned it under the Truth in Lending Act, the Federal Reserve Board exercises its formal rulemaking authority in amendments to Regulation Z. In addition, both the Board and its staff issue interpretations as to what, in particular circumstances, the Act and the Regulation require.

In reviewing a Federal Communications Commission rule, which raised much broader policy issues than those entailed in determining whether any particular credit term should be disclosed, this Court reaffirmed the

> venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong . . . .

Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 381 (1969). *Accord, Du Pont de Nemours & Co. v. Collins*, 432 U.S. 46, 54-55 (1977). Although using a somewhat different verbal formulation, this Court more recently described the standard of review in terms of reasonableness; that is, if the agency construction of a statute through rulemaking is not unreasonable, it should not be disturbed on review. *Zenith Radio Corp. v. United States,* 437 U.S. 443, 450-51, 455 (1978). *See American Trucking Association, Inc., v. United States,* 344 U.S. 298, 313-14 (1953). An administrative agency's construction of its own regulation is entitled to even greater deference; indeed, this Court has held that such construction has controlling weight unless it is "plainly erroneous" when compared to the regulation. *Udall v. Tallman,* 380 U.S. 1, 16-17 (1965); *Bowles v. Seminole Rock & Sand Co.,* 325 U.S. 410, 413-14 (1945).

In the *Mourning* case, the Court emphatically applied these principles to the Board's rulemaking function under the Truth in Lending Act. In rejecting the respondent's contention that the "four installment rule" was unduly harsh, the Court stated:

> That some other remedial provision might be preferable is irrelevant. We have consistently held that where reasonable minds may differ as to which of several remedial measures should be chosen, courts should defer to the informed judgment of the agency to whom Congress delegated authority.

411 U.S. at 371-72.

The Court went beyond this to recognize, at least implicitly, that staff interpretations of creditor obligations under Regulation Z have controlling force. In stating that, under the rule, not all creditors within the rule's ambit need disclose a finance charge or annual percentage rate, the Court referred to a Board Advisory Letter and to a letter of a Board staff member. 411 U.S. at 377 n.42. The Court thus treated the letters as, in effect, controlling law as to what disclosures creditors who do not assess finance charges must make, and, by implication, indicated that creditors generally should be able to rely on other, similar Board and staff interpretations.

The ability so to rely on affirmatively stated requirements is critical to the proper functioning of the Act as well as to fairness to creditors. But it is equally critical that creditors be able to rely on the absence of any specific disclosure requirement promulgated by the Board. The Board, through Regulation Z and through formal interpretations by itself and by its staff, has carefully identified, explicitly and in great detail, the disclosures creditors must make. The Board has thus exercised its affirmative duty under the Act

to specify those particularly significant credit terms that must be disclosed, and has decided, by implication, that other terms need not be included, even though they appear in the credit contract. If the Board has not specifically identified a term as subject to disclosure, the courts should not infer that the Board was indifferent to the problem or simply had not thought of it. On the contrary, the Board's silence should be taken as conclusive that disclosure is *not* required.

Any other approach engenders the problems of accretion and attendant confusion that, as described above, have plagued the Truth in Lending Act throughout the decade of its history. Indeed, any other approach would require the Board explicitly to reject inclusion of each and every credit term which it arguably could have included, but did not include, among the limited list of significant terms that must be disclosed.

Some courts already have adopted the approach advocated here. Thus, in considering the acceleration clause issue, the Eighth Circuit stated:

> Defendants' disclosure statement fully complies with the Act and Regulation Z in describing the method of rebate in the event of prepayment. Regulation Z, fairly read, requires only the disclosure of the consequences of *prepayment,* not the effect of the exercise of a right to accelerate. In our judgment, no such additional disclosure requirement is either explicit or implicit in the language of the Regulation. To the extent the absence of such disclosure requirement may be perceived by the courts as a hole in the regulatory matrix, only the Federal Reserve Board is authorized to fill the hole. It is for the Board itself, not the courts, to assess the potential impact of the exercise of the right of acceleration upon the credit customer and on the basis thereof to determine whether to explicitly expand the existing disclosure requirements. We are unwilling to usurp the prerogatives of the Board.

Griffith v. Superior Ford, 577 F.2d 455, 460 (8th Cir. 1978). *Accord, Croysdale v. Franklin Savings Association,* No. 78-1364 (7th Cir. July 12, 1979).

This Court's adoption of the foregoing approach in these cases, to reverse the Ninth Circuit's judgments, would contribute substantially to achievement of the Truth in Lending Act's purposes, at once affording debtors the protection Congress intended and greatly facilitating creditor efforts to comply with what would be relatively clear and uniform disclosure standards. This is not to say that the substance of Truth in Lending disclosure has been or will be frozen. Congress has amended the disclosure provisions of the Act in the past [Pub. L. No. 93-495, Tit. IV, 88 Stat. 1517 (1974)] and has had pending before it in the 95th and 96th Congresses major substantive amendments.[18] Further, the Board has clearly demonstrated a willingness to reexamine Truth in Lending principles and to alter them where advisable. But it must be the Congress and the Federal Reserve Board that make changes. Only they can evaluate the impact of change on diverse creditors and diverse credit transactions, weigh proposed changes against goals with

18. *See, e.g.,* S. 2802 and H.R.12158, 95th Cong., 2d Sess. (1978); S. 108, H.R. 1289, H.R. 3553 and H.R. 4270, 96th Cong., 1st Sess. It is interesting to note that, contrary to the trend of the judicial decisions, S. 108, which passed the U.S. Senate unanimously on May 1, 1979, *reduces* and simplifies the disclosure provided to consumers. S. 108, 96th Cong., 1st Sess. (1979), as passed by the Senate, 125 CONG. REC. S4984-88 (daily ed. May 1, 1979). S. 108 and its predecessor, S. 2802 [S. 2802, 95th Cong., 2d Sess. (1978), as passed by the Senate, 124 CONG. REC. S7233-38 (daily ed. May 10, 1978)], may be taken as some reflection of how accurately the Senate believes the judiciary has responded to Congressional intent.

which they are intimately familiar, and proceed to accomplish change in an orderly, prospective manner, with uniform national application.

CONCLUSION

Because the decision of the United States Court of Appeals for the Ninth Circuit added a Truth in Lending Act disclosure obligation beyond those that the Federal Reserve Board, in the exercise of its statutory authority, specifically has defined, the California Bankers Association respectfully submits that the judgments in these consolidated cases should be reversed.

Respectfully submitted,

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Dated: August 22, 1979

No. 78-1487

IN THE

Supreme Court of the United States

October Term, 1979

FORD MOTOR CREDIT COMPANY, et al.,

Petitioners,

v.

DENNIS MILHOLLIN, et al.,

Respondents

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF AMICI CURIAE OF NATIONAL CONSUMER FINANCE ASSOCIATION AND GENERAL MOTORS ACCEPTANCE CORPORATION

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**BRIEF AMICI CURIAE OF
NATIONAL CONSUMER FINANCE ASSOCIATION
AND
GENERAL MOTORS ACCEPTANCE
CORPORATION**

STATEMENT OF INTEREST OF AMICI CURIAE

This brief amici curiae is filed by the National Consumer Finance Association and General Motors Acceptance Corporation with the written consent of counsel for the parties.

NCFA is the nation's largest trade association serving the consumer finance industry. Founded in 1916, the Association has as members nearly 800 consumer finance

and industrial banking companies operating more than 17,000 offices across the United States. Members of NCFA hold approximately $45 billion in outstanding consumer credit. GMAC is a credit finance institution engaged in the business of purchasing retail installment contracts from automobile dealers. GMAC conducts its operations from 394 branch offices in the United States and Canada, from which it provides financing services to over 18,400 General Motors dealers. At the present time, GMAC holds more than 4 million retail installment contracts representing over $14 billion in outstanding credit.

GMAC and the members of NCFA are engaged in business in every state in the nation. A substantial portion of that business involves making consumer loans and acquiring retail installment contracts that are subject to the Federal Truth in Lending Act and Regulation Z. The decision in this case will affect every consumer loan and retail installment contract held by GMAC and the members of NCFA.

QUESTION PRESENTED

Neither the Truth in Lending Act nor the Federal Reserve Board's Regulation Z issued thereunder specifically calls for disclosure of the provision for acceleration of payments upon default that is found in all installment contracts. The Federal Reserve Board has ruled that disclosure is required by reason of an acceleration clause only in the limited case when a difference in rebating unearned finance charges upon voluntary prepayment, on the one hand, and prepayment following acceleration on the other, means that a borrower who prepays following acceleration is made to pay what amounts to a default charge, the disclosure of which is in terms required by both the Act and Regulation Z.

The question presented is whether the Act and Regulation Z nevertheless require disclosure of the common acceleration provision.

STATEMENT

The relevant facts are quickly stated. Respondents purchased automobiles from Ford dealers on installment contracts. The contracts were assigned to petitioner Ford Motor Credit Company. The contracts were single-sheet documents, printed on both sides. (App. 9-10, 65-66.) The front side contained disclosures required by the Truth in Lending Act and Regulation Z as well as contractual terms. The reverse side contained additional contractual terms. One term stated on the reverse side was this:

> "In the event Buyer defaults in any payment. . . or fails to comply with other provisions hereof. . . Seller shall have the right to declare all amounts due or to become due hereunder to be immediately due and payable . . . ." (App. 10, 66.)

This is an "acceleration provision, similar to that found in many installment undertakings," which this Court noted as present also in the contract in *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 358 (1973).

On the front side of the contract was a provision for prepayment, which stated that, if the buyer prepaid, he would receive a rebate of the unearned portion of the finance charge computed according to a certain method after the deduction of a $15 fee. (App. 9, 65.) Under Ford Credit's company policy (App. 22, 68) and under the law of the state where the contracts were executed, Oregon, the same rebate would be paid whether the purchaser

prepaid the entire debt voluntarily or did so in response to an exercise of the acceleration privilege.

Also on the front side, properly disclosed, was a provision for a delinquency charge of 5 percent or $5, whichever was less, for payments late by more than 10 days. (App. 9, 65.)

Respondents fell behind in their payments. Ford Credit accelerated the unpaid installments and repossessed the automobiles. These Truth in Lending Act lawsuits followed. Respondents prevailed on various truth-in-lending grounds in the district court. (App. 26-41, 69-74.) The court of appeals affirmed on the sole ground that the existence of the acceleration provision of the contract and the fact that the same rebate would be paid for prepayment upon acceleration as upon voluntary prepayment must be disclosed and were not disclosed. (App. 42-54.) It engaged in no analysis but simply followed a decision of a differently-constituted panel of the same court. *St. Germain* v. *Bank of Hawaii,* 573 F.2d 572 (9th Cir. 1977). (Pet. 40a-51a.)

ARGUMENT

Acceleration clauses, which if not quite universal must be the most nearly universal of all installment contract provisions, are not mentioned in the disclosure requirement provisions of the Truth in Lending Act or those of the Federal Reserve Board's Regulation Z. In consonance with the silence of Congress and with its own silence as the agency that Congress chose to fill whatever gaps it may have left in the statutory regime of credit cost disclosure, the Federal Reserve Board has ruled, both formally and informally, that there is no general requirement to

disclose acceleration clauses. The Board's position is fully consistent with the statutory purpose.

Proper regard for the role of the Federal Reserve Board as Congress' chosen instrument under the Truth in Lending Act, as described by this Court in *Mourning* v. *Family Publications Service, Inc.,* 411 U.S. 356 (1973), and proper regard for the general rule of deference to an agency's construction of its own regulations, *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965), demand that significant and perhaps controlling weight be given to the Federal Reserve Board's views. The court below, instead, acting on its own view of the "overriding purpose of Congress in enacting" the Truth in Lending Act (Pet. 49a), has read a requirement of disclosure of all acceleration clauses into an inapt provision of Regulation Z.

It is particularly important that, in reversing the judgment based on that plainly erroneous reading, this Court insist upon respect by the judiciary for the authoritative views of the Federal Reserve Board. Hundreds of Truth in Lending Act cases are in the courts, and more are filed regularly.[1] The results in cases that have been decided — those involving the issue posed in this case as well as others — demonstrate the likelihood of conflicting results in pending and future cases. This Court cannot realistically expect to resolve all the differences. This is only the second Truth in Lending Act case that it has heard in the 10 years the Act has been on the books. Congress meant that there

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[1] About 2,000 truth-in-lending cases have been filed in the federal district courts alone during each of the last four years. The number of truth-in-lending cases filed each year, for the 12-month period ending June 30, was: 1975 - 2237; 1976 - 2147; 1977 - 2183; 1978 - 1957. 1978 Annual Report of the Director, Administrative Office of the United States Courts 83.

should be uniform nationwide standards of disclosure. Proper deference by the courts to the views of the Federal Reserve Board would result in a greater measure of uniformity than has prevailed.

I. NEITHER THE STATUTE NOR THE REGULATION IN TERMS REQUIRES DISCLOSURE OF ACCELERATION CLAUSES AND THE FEDERAL RESERVE BOARD HAS RULED THAT NO SUCH DISCLOSURE IS REQUIRED.

In most cases that this Court hears involving the construction of a federal statute or regulation, there is at base a true ambiguity. We submit that there is no such ambiguity here.

In the case of credit sales not under an open-end credit plan — which is what is involved here — Section 128 of the Truth in Lending Act requires the disclosure of a number of items. 15 U.S.C. § 1638. Acceleration clauses are not among them. In fact, since the enactment of the Act, only one provision, Section 128(a)(9), has been suggested as the source of a requirement that acceleration clauses be disclosed. That subsection requires the disclosure of "[t]he default, delinquency, or similar charges payable in the event of late payments." The Federal Reserve Board, pursuant to its duty under Section 105, 15 U.S.C. § 1604, to "prescribe regulations to carry out the purposes of" the Act, has adopted a provision within its Regulation Z that tracks and somewhat amplifies Section 128(a)(9). It requires disclosure of "the amount, or method of computing the amount, of any default, delinquency, or similar charges payable in the event of late payments." 12 C.F.R. § 226.8(b)(4). Although some district courts, following the early lead of *Garza* v. *Chicago Health Clubs, Inc.*, 347 F. Supp. 955 (N.D. Ill. 1972), managed the difficult chore of shoehorning the creditor's acceleration privilege into

the concept of a late charge, every court of appeals that has addressed the issue has rejected that interpretation of "charges."[2] Indeed, the court below in *St. Germain* v. *Bank of Hawaii,* 573 F.2d 572, 573-74 (9th Cir. 1977), the case that was the sole authority for the decision here, refused to rest its decision on Section 128(a)(9) or the corresponding provision of Regulation Z and succinctly made the case against reading so much into "charges." (Pet. 42a-43a.)

The Federal Reserve Board went beyond the specifics of the statute in fulfilling its statutory duty to prescribe regulations to carry out the purposes of the Act. But it, like Congress, said nothing about acceleration clauses. In Section 226.8(b)(7) of Regulation Z, the Board did require identification of the method of computing any unearned finance charges that will be rebated in the event of prepayment and disclosure of the fact, whenever it is a fact, that unearned finance charges will not be refunded upon prepayment. 12 C.F.R. § 226.8(b)(7).

Section 226.8(b)(7) seems plainly, on its face, not to amount to a general requirement to disclose the existence of acceleration clauses. The Board's staff, when asked, has confirmed that no such general requirement was intended by that provision or, much less, by Section 226.8(b)(4). On that question it has not, as the court below asserted in *St. Germain,* "issued conflicting signals . . . ." (Pet. 50a.) It has been steadfast and consistent.

In an Official Staff Interpretation,[3] the Board's staff

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[2] See cases cited at p. 17, *infra.*

[3] No. FC-0054, 42 F.R. 18056, [1974-1977 Transfer Binder] Cons. Cred. Guide (CCH) ¶ 31,552. (Pet. 52a-56a.)

followed an earlier Public Information Letter[4] and stated that, while there is no requirement to disclose the very existence of the creditor's privilege of accelerating payment, the treatment of unearned finance charges upon payment following acceleration may give rise to a disclosure requirement. As a general matter the Board ruled that if unearned finance charges are rebated upon payment after acceleration in the same way they are rebated upon early payment without acceleration, the disclosure of the general prepayment terms in compliance with 12 C.F.R. § 226.8(b)(7) is enough. Since the debtor is treated the same whether he pays early voluntarily or involuntarily, and since he has already been informed of the terms of early payment, there is no need to disclose the acceleration clause. On the other hand, if an amount is retained upon payment following acceleration that would have been rebated upon voluntary prepayment, that penalty is not revealed to the debtor by disclosure of the prepayment clause. When the terms of payment following acceleration vary from terms of prepayment, without acceleration, the Board reasoned, disclosure of the extra amounts due upon payment following acceleration is required in order to inform the debtor of a "charge" for late payment under 12 C.F.R. § 226.8(b)(4).

In the instant case, as has been stated, by law and by company policy, the same rebate would be paid in either case in accordance with the prepayment disclosure in the contract.

The court below in *St. Germain* nevertheless took the Board's position and twisted it into an "equat[ion of] acceleration with prepayment" (Pet. 50a), so that in all cases the creditor must disclose whether a rebate of unearned interest will be made on acceleration and disclose the method of computing the amount of the rebate — even though the rebate is exactly the same as upon voluntary repayment.

[4] No. 851, [1974-77 Transfer Binder] Cons. Cred. Guide (CCH) ¶ 31,173. (Pet. 57a-58a.) *See also* Public Information Letter No. 1208, [1974-1977 Transfer Binder] Cons. Cred. Guide (CCH) ¶ 31,647; and Public Information Letter No. 1324, Cons. Cred. Guide (CCH) ¶ 31,827. (Pet. 59a-63a.)

The whole idea of equating acceleration and prepayment is otherworldly. Acceleration is a remedy for default, and the debtor who has defaulted on one installment is not likely to pay off the balance of his debt in one payment. Acceleration is actually a procedural device, enabling the creditor to sue at once for the entire debt instead of for each installment as it falls due.

The court of appeals professed to find guidance in "Congress' overriding interest in disclosure to provide consumer protection." (Pet. 44a.) But Congress had no interest in disclosure in general. Its interest was in compelling disclosure of those aspects of credit that would enable the borrower or purchaser to determine the cost to him of the loan he was thinking of taking or the credit purchase he was thinking of making — and to be able to compare that cost with the cost at the finance company or car dealer down the street. § 102, 15 U.S.C. § 1601.

Congress specified some items that are relevant to that comparative cost computation. The Federal Reserve Board, acting pursuant to a congressional mandate, saw that Congress had omitted at least one item that could affect the cost of credit for some borrowers or purchasers — the treatment by the creditor of unearned interest when the debt was paid off early. It therefore included Section 226.8(b)(7) in Regulation Z. But if, as all seem to agree is the case, acceleration clauses are found in all or virtually all installment contracts, to require the creditor to disclose that he has the privilege of accelerating payments on

default would not facilitate comparative shopping for credit. Any such requirement would simply add further clutter to disclosure statements that, as this Court can see by just looking at the examples in the record (App. 9, 65), are already so cluttered that one must doubt how effectively they convey useful information to prospective borrowers or purchasers.

II. EVEN MORE THAN USUAL DEFERENCE IS OWING TO THE FEDERAL RESERVE BOARD'S CONSTRUCTION OF THE STATUTE AND OF REGULATION Z.

Even if the question were closer, the court below erred in disregarding the authoritative views of the Federal Reserve Board as to the meaning of the statute and Regulation Z.

Congress gave the Board a unique role in carrying out the Act. It provided in Section 105: "The Board shall prescribe regulations to carry out the purposes of this Act." 15 U.S.C. § 1604. That is sweeping authority. Thus, no one could seriously challenge the Board's power to adopt the prepayment disclosure requirement of Regulation Z, even though prepayment is not mentioned in the Act. In Section 103(q) Congress reemphasized the Board's position by stating that any reference in the statute to a provision of the Act automatically includes the regulations promulgated by the Board under that provision. 15 U.S.C. § 1602(q). Other agencies are empowered to enforce the statute with respect to entities they supervise — *e.g.*, the Civil Aeronautics Board as to air carriers, the Interstate Commerce Commission as to surface carriers and the Federal Trade Commission as to corporations generally. The truth-in-lending law they enforce includes the regulations issued by the Federal Reserve Board. §§ 103(q), 108(a) and (c), 15 U.S.C. §§ 1602(q), 1607(a) and (c).

Because of the Board's all-encompassing authority, Congress authorized it to solicit the views of other interested agencies before framing regulations. § 109, 15 U.S.C. § 1608. Finally, recognizing the critical role it had conferred upon the Board, Congress instructed the Board, along with the Attorney General, to report to the Congress each year on the administration of the Act. In addition, the Board must assess for Congress the extent to which compliance with the Act is being achieved. § 114, 15 U.S.C. § 1613.

The legislative materials demonstrate that Congress intended the Board to play the critical role in shaping disclosure standards that the statute spells out. The House committee's report declared:

> "All substantive regulations in connection with the full disclosure of the terms and conditions of finance charges in credit transactions . . . shall be issued by the Board of Governors of the Federal Reserve System. No one can deny their experience and expertise in these matters. Accordingly, it is the view of your committee that, *for uniformity of application to all affected segments of the industries concerned, a single set of comprehensive regulations should be issued.*
>
> ". . . .
>
> ". . . The Board of Governors of the Federal Reserve System is to be the *central single agency* for issuing all regulations on credit disclosure . . . to insure *a single set of overall standards applicable for all forms of consumer credit* . . . ." H.R. Rep. No. 1040, 90th Cong., 1st Sess. 18-19 (1967) (emphasis added).

In addition, Congresswoman Sullivan, a House sponsor of the bill, chairperson of the subcommittee that considered the Act, and a conferee, described the conference bill to the House by explaining that "the Federal Reserve [will have] overall responsibility for issuing all regulations on the disclosure requirements." 114 Cong. Rec. 14387 (1968). *See also Truth in Lending — 1967: Hearings on S. 5 before the Subcommittee on Financial Institutions of the Senate Committee on Banking and Currency*, 90th Cong., 1st Sess. 18 (1967) (commentary of Senator Proxmire); 114 Cong. Rec. 1422 (1968) (comments of Congressman Latta).

This Court recognized the extraordinary powers that Congress conferred on the Board in its only previous Truth in Lending Act decision, *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356 (1973). The Board had provided in Regulation Z that a consumer sales agreement payable in more than four installments was subject to the Act. The court of appeals found that the Board had exceeded its statutory authority by including within the Act transactions in which no finance charge had been imposed. This Court reversed the court of appeals and sustained the authority of the Federal Reserve Board. Congress had "determined to lay the structure of the Act broadly" and had entrusted "its construction to an agency with the necessary experience and resources to monitor its operation." The Congress in Section 105 "delegated to the Federal Reserve Board broad authority to promulgate regulations necessary to render the Act effective." 411 U.S. at 365. Accordingly, this Court found the regulation within the broad scope of the Board's power and rejected the challenge of the court of appeals to the Board's discretion.

Many courts have followed the lead of this Court in recognizing that the Federal Reserve Board is primarily

responsible for carrying out and construing the Truth in Lending Act and that the judiciary plays a distinctly secondary role. In *Mourning*, the issue was the validity of a regulation. The Court held that judges should not intervene as long as the contested regulation was reasonably related to the purposes of the statute, 411 U.S. at 369, and that, where "reasonable minds may differ," the courts should "defer to the informed experience and judgment of the agency to whom Congress delegated the appropriate authority," *id.* at 371-72. Similarly, numerous lower courts have recognized that the Board has the authority to promulgate regulations under the Act, and that the courts should not insert new disclosure requirements into Regulation Z when the Board has not seen fit to impose them itself. *See, e.g., Croysdale* v. *Franklin Savings Ass'n*, No. 78-1364 (7th Cir. July 12, 1979); *Griffith* v. *Superior Ford*, 577 F.2d 455 (8th Cir. 1978); *Philbeck* v. *Timmers Chevrolet, Inc.*, 499 F.2d 971 (5th Cir. 1974); *Gardner and North Roofing and Siding Corp.* v. *Federal Reserve Board*, 464 F.2d 838 (D.C. Cir. 1972).

The rationale of these cases becomes even more compelling when the Board's interpretation of its own regulation, and not the validity of a provision of the regulation, is at issue. The Board was empowered and directed to draft and adopt the regulation in the first instance. No question of the power and the duty of the Board has been raised here. The Board's interpretation of the very regulation that it has thus promulgated as Congress' undoubted delegate calls into play a broad principle of administrative law as well as respect for Congress' specific choice of the Federal Reserve Board as its truth-in-lending agent. The Board's interpretation of its regulation should be respected for the commonsensical reason that the author of a regulation knows its meaning best, as well as for the reason that the Board and not the courts understands the interaction

of the consumer credit market, the enforcement of the Act, and the regulation. For instance, the Fifth Circuit in *Philbeck* v. *Timmers Chevrolet, Inc.,* 499 F.2d 971, 977 (5th Cir. 1974), emphasized that the Board's construction of Regulation Z was "especially entitled to great deference." Other courts have reached a similar result by concluding that the Board's construction of the regulation is entitled to "great weight", *e.g., United States* v. *One 1976 Chevrolet Station Wagon,* 425 F. Supp. 550 (D.N.M. 1976) *aff'd in part and rev'd in part on other grounds,* 585 F.2d 978 (10th Cir. 1978); and "substantial deference," *Gantt* v. *Commonwealth Loan Co.,* 573 F.2d 520 (8th Cir. 1978).

The Court of Appeals for the Eighth Circuit may have put it best. Addressing the very issue with which we are concerned here, the court stated that neither it nor any other court had power to enlarge the number of required disclosures.

> "That power has been expressly given only to the Board: 'The *Board* shall prescribe regulations to *carry out the purposes of [the Act].' Id.* § 1604 (emphasis added). The judiciary is limited to the specific disclosure requirements of Regulation Z in the consideration of whether disclosure of an acceleration clause is necessary to carry out the purposes of the Act." *Griffith* v. *Superior Ford,* 577 F.2d 455, 458 (8th Cir. 1978).

In deferring to the Federal Reserve Board's interpretations of Regulation Z, the courts whose opinions we have cited heeded not only *Mourning* but also this Court's general admonition to respect an agency's construction of its own regulations. In *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965), this Court first stated that "it shows great

deference to the interpretation given [a] statute by the officers or agency charged with its construction." It went on, "When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order." The administrative construction is controlling unless it is "plainly erroneous or inconsistent with the regulation." *Bowles* v. *Seminole Rock Co.,* 325 U.S. 410, 414 (1945). That is, the interpretation need not be the only possible construction of the regulation; it need only be a reasonable interpretation. *Udall* v. *Tallman, supra; see also Thorpe* v. *Housing Authority of Durham,* 393 U.S. 268, 276, 280-81 (1969); *American Trucking Ass'ns* v. *United States,* 344 U.S. 298 (1953). Clearly the Federal Reserve Board's reading of its own Regulation Z as not calling for the disclosure of the very existence of an acceleration clause is reasonable.

III. JUDICIAL DEFERENCE TO THE FEDERAL RESERVE BOARD'S INTERPRETATION OF THE TRUTH IN LENDING ACT AND REGULATION Z IS VITAL TO THE ADMINISTRATION OF THE ACT

Truth-in-lending law has become a jurisprudence of great complexity and technicality, with its own literature and specialists.[5] The demands that the complexity of the

[5] Commerce Clearing House devotes a substantial portion of volumes 1 and 5 of its Consumer Credit Guide to truth in lending, while Prentice-Hall issues a Consumer and Commercial Credit Reporter. Warren Gorham & Lamont has published a Truth-in-Lending Manual. A survey of the Index to Legal Periodicals revealed that over 35 truth-in-lending articles were published between September 1973 and August 1976. Just on the issue presented here, *see* Note, *Disclosure of Acceleration Clauses under Federal Truth in Lending,* 26 Kan. L. Rev. 289 (1978); Note, *Acceleration Clause Disclosure under the Truth in Lending Act,* 77 Colum. L. Rev. 649 (1977); Note, *Acceleration Clause Disclosure: A Truth in Lending Policy Analysis,* 53 Ind. L.J. 97 (1977); Comment, 46 U. of Cinn. L. Rev. 284 (1977); Comment, 54 Tex. L. Rev. 652 (1976).

law has placed upon what should be simple and comprehensible disclosure forms that would enable consumers to know readily what credit is going to cost them are evident in this record. Any thoroughgoing simplification is a task for Congress. *See Simplification of the Truth in Lending Act, Oversight Hearings before the Subcommittee on Consumer Affairs of the House Committee on Banking Finance and Urban Affairs,* 95th Cong., 2d Sess. (1978). This Court can, however, help. Practically it cannot help very much by the exercise of its review power. It cannot itself review every dubious or conflicting truth-in-lending decision. It can help materially by making clear to the other courts that, when the meaning of the disclosure provisions of the statute or of Regulation Z is in issue, they are bound to defer to the expert views of the Federal Reserve Board.

Most of the complexity of truth in lending arises from litigation. Not all courts hearing truth-in-lending cases have been willing to yield primacy to the agency on which Congress conferred primacy. This recalcitrance has contributed to a lack of uniformity in the outcome of truth-in-lending cases, which is expensive and disrupting for creditors and does not assist borrowers at all. In disregarding the Federal Reserve Board's views, the federal courts have dictated numerous disclosure details, as varied as the number of sheets of paper required for a truth-in-lending disclosure form, *Pedro* v. *Pacific Plan of California,* 393 F. Supp. 315, 322-23 (N.D. Calif. 1975); and the disclosure of a 10-day limitation on security interests embodied in state law, *Willis* v. *Town Finance Corp. of Atlanta,* 416 F. Supp. 10 (N.D. Ga. 1976). *See also Jones* v. *Community Loan and Investment Corp.,* 544 F.2d 1228 (5th Cir. 1976), *cert. denied,* 431 U.S. 934 (1977). The acceleration clause dispute that is now here is a prime example. At least three different views

have been taken by courts of appeals. None of the circuits has specifically embraced the Federal Reserve Board's position in its entirety. *See Price* v. *Franklin Investment Co.,* 574 F.2d 594 (D.C. Cir. 1978); *Griffith* v. *Superior Ford,* 577 F.2d 455 (8th Cir. 1978); *McDaniel* v. *Fulton National Bank,* 571 F.2d 948 (5th Cir.) (en banc), *rehearing denied,* 576 F.2d 1156 (5th Cir. 1978); *Begay* v. *Ziems Motor Co.,* 550 F.2d 1244 (10th Cir. 1977); *Johnston* v. *McCrackin - Sturman Ford, Inc.,* 527 F.2d 257 (3d Cir. 1975).

In each instance, the court presumably has acted with the best of intentions. District court judges and appellate court panels have thought that they had a better grasp on the congressional intent behind the Truth in Lending Act and the meaning of Regulation Z than the Federal Reserve Board. But the resulting patchwork of decisions has had a cumulative effect that threatens to frustrate the congressional design behind the Truth in Lending Act. The House committee, it will be recalled, emphasized that the Federal Reserve Board alone was being empowered to adopt substantive disclosure regulations "to insure a single set of overall standards applicable to all forms of consumer credit . . . ." (P. 11, *supra.*) It cannot be said that there is a single set of standards today.

Phillip E. Coldwell, a member of the Board of Governors of the Federal Reserve System, last year told a House subcommittee exploring the need for simplification of truth in lending:

> "A large amount of truth in lending litigation continues to burden the courts. Unfortunately, compliance with a specific truth in lending requirement often means different things to different courts. Courts in one district

may interpret a statutory requirement differently from those in another.

"Many creditors operating outside local areas have had to design different disclosure statements for different judicial districts or circuits. Court opinions also occasionally differ from Board or staff opinions on the same issue. The consistent, uniform interpretation of the act has become almost an impossibility. Even though creditors may make every effort to comply with the statute's requirements, multitudinous interpretations of broad statutory language make it impossible for them to know that their disclosure statements comply fully with the act's provisions." *Simplification Hearings, supra* at 79.

Not only creditors suffer. So do borrowers and purchasers. Governor Coldwell commented:

"At the present time, the consumer often receives lengthy and complex truth in lending disclosure interspersed among contractual provisions and state law disclosures. We believe that truth in lending cannot be truly effective when the consumer is presented with discouragingly detailed and complicated disclosures. Overwhelming the consumer cannot result in a better informed, credit conscious consumer; rather, it will result in a consumer who will often ignore all disclosures and not attempt to digest the information provided." *Id.* at 78;[6] *see also* H.R. Rep. No.280,

[6] An excellent empirical study confirms Governor Coldwell's opinion. Davis, *Protecting Consumers from Overdisclosure and Gobbledygook: An Empirical Look at the Simplification of Consumer-Credit Contracts,* 63 Va. L. Rev. 841 (1977). The author explored consumer comprehension of credit terms by showing a standard consumer

95th Cong., 1st Sess. 32-33 (1977) (noting the complexity of truth-in-lending forms and creditors' quandary in determining how to comply with the Act.)

The decision below, whose rationale is to be found in the *St. Germain* case, exemplifies the judicial activism that has prompted the federal courts to write as much truth-in-lending law as they have. The court of appeals substituted its evaluation of the congressional intent and the meaning of Regulation Z for the Board's authoritative views. The Board's conclusion that the existence of acceleration clauses need not be disclosed was at the very least reasonably related to the language of the Board's own regulation. Nevertheless, the court below concluded that universal disclosure of acceleration clauses would best fulfill the intent of Congress and disregarded the Board's views.[7] The court failed to respect the unique role of the Federal Reserve Board in interpreting the Truth in Lending Act, the role that this Court emphasized so strongly in *Mourning*. The Court, in reversing, should make clear that the primacy of the Federal Reserve Board means that a court must accept the Board's views if they are reasonable regardless of what the court might decide as an original matter.

credit contract to one group and then showing a simplified version to another group with comparable characteristics. He found that consumers, particularly low income consumers, understood the terms of the contract much better when, among other things, several less-important disclosure items were deleted. *Id.* at 870-874, 881-84.

[7] When courts have overruled agency interpretation of regulations, the basis has frequently been the fact that the agency has ensnared by interpretation someone who owes no duty under the regulation itself. *See* 4 K. Davis, Administrative Law § 30.12 (1958). In this case, the Ninth Circuit, not the Board, has imposed a disclosure obligation that would surprise someone who had read only the regulation.

CONCLUSION

Amici believe it important that the judgment below be reversed and that this Court make clear to all courts hearin truth-in-lending cases the necessity that, in construing the Act and Regulation Z, they defer to the views of the Federal Reserve Board.

Respectfully submitted,

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August 1979

No. 78-1487

In the Supreme Court of the United States

OCTOBER TERM, 1978

FORD MOTOR COMPANY, ET AL., PETITIONERS

v.

DENNIS MILHOLLIN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation of June 18, 1979.

QUESTIONS PRESENTED

The United States will discuss the following questions:

1. Whether the Truth in Lending Act and the Regulations thereunder require the disclosure of the creditor's right to accelerate a debt upon default by the borrower.

2. Whether the Act and Regulations require a creditor to disclose whether he will rebate to the borrower unearned finance charges upon acceleration of the debt and the method of computing such rebate.

STATUTES AND REGULATIONS INVOLVED

Section 128(a)(9) of the Truth in Lending Act (15 U.S.C. 1638(a)(9)) provides:

> (a) In connection with each consumer credit sale not under an open end credit plan, the creditor shall disclose each of the following items which is applicable:
>
> * * * * *
>
> (9) The default, delinquency, or similar charges payable in the event of late payments.

Regulation Z (12 C.F.R. 226.8(b)(4)) provides:

> (b) In any transaction subject to this section, the following items, as applicable, shall be disclosed:
>
> * * * * *
>
> (4) The amount, or method of computing the amount, of any default, delinquency, or similar charges payable in the event of late payments.

Regulation Z (12 C.F.R. 226.8(b)(7)) provides:

> (b) In any transaction subject to this section, the following items, as applicable, shall be disclosed:
>
> * * * * *
>
> (7) Identification of the method of computing any unearned portion of the finance charge in the event of prepayment in full of an obligation which includes precomputed finance charges and a statement of the amount or method of computation of any charge that may be deducted from the amount of any rebate of such unearned finance charge that will be credited to the obligation or refunded to the customer. If the credit contract does not provide for any rebate of unearned finance charges upon prepayment in full, this fact shall be disclosed.

STATEMENT

1. Respondents Milhollin, Eaton, Messinger, and Andresen purchased automobiles from various dealers, including petitioners Dee Thomason Ford, Marv Tonkin Ford Sales, Inc., and Webster-Wolfard Ford, Inc., and financed their purchases through retail installment sale contracts with petitioners. In each case, the dealers subsequently assigned the installment sale contract to petitioner Ford Motor Credit Company (Pet. App. A 2a-3a). The installment payments which respondents agreed to make included a precomputed finance charge (A. 9, 65).

The disclosure statement required by the Truth in Lending Act and Regulation Z was set forth on the front page of each contract. The disclosure statement explained how the creditor would rebate the unearned portion of the finance charge in the event that the buyer prepaid his obligation in full prior to maturity of the final installment, in the following terms (A. 9, 65):

> Prepayment Rebate: Buyer may prepay his obligations under this contract in full at any time

prior to maturity of the final installment hereunder, and, if he does so, shall receive a rebate of the unearned portion of the Finance Charge computed under the sum of the digits method after first deducting an acquisition fee of $15.00. No rebate will be made if the amount is less than $1.00.

On the reverse side of the front page, set forth separately from the disclosure statement, each contract contained an acceleration clause giving the seller the right to declare all amounts that were due or would become due under the contract "to be immediately due and payable" in the event of the buyer's default (A. 10, 66).

2. Respondents brought these four separate suits for statutory damages[1] under the Truth in Lending Act in the United States District Court for the District of Oregon against petitioner Ford Motor Credit Company and the dealers from whom they purchased their automobiles. Respondents claimed, *inter alia*, that petitioners' failure to disclose on the front page of the contract the creditor's right to accelerate the indebtedness violated the provision of the Act requiring disclosure of "[t]he default, delinquency, or similar charges payable in the event of late payments" (15 U.S.C. 1638(a)(9)) (A. 5, 58). In response, petitioners took the position that their policy was to rebate unearned finance charges upon payment after acceleration in the same manner as upon voluntary prepayment, and that the disclosures required by the Act with respect to voluntary prepayment were stated on the face of the contract (see A. 22, 68).[2]

In respondent Milhollin's suit, the district court held that the Truth in Lending Act and Regulation Z require creditors "to disclose and fully explain any right of acceleration" on the face of the contract (Pet. App. 17a). However, since respondent Milhollin's contract antedated an earlier decision of the same district court giving only prospective application to the rule requiring disclosure of the right to accelerate (see *Woods* v. *Beneficial Finance Co. of Eugene*, 395 F. Supp. 9 (D. Ore. 1975)), the court declined to hold that petitioners' failure to disclose and explain their rights of acceleration violated the Act (Pet. App. B 17a-18a). The court nevertheless found a violation of the Act and ruled in favor of respondent Milhollin on the ground that petitioner Ford Motor Credit Company had not been adequately disclosed as a creditor under the contract (Pet. App. B 15a-17a, 19a-20a, 21a).[3]

[1] The damages recoverable by the borrower for a Truth in Lending Act violation are actual damages sustained as a result of the violation, and twice the finance charge, with a liability of not less than $100 or more than $1,000. See 15 U.S.C. 1640(a)(1). The borrower is not required to show actual damages and may also recover attorney's fees and costs. See 15 U.S.C. 1640(a)(2).

[2] Respondents did not dispute the truth of petitioners' allegations that their rebate policy upon payment after acceleration was the same as upon voluntary prepayment and that the latter policy was disclosed.

[3] The district court in *Eaton* v. *Ford Credit Company* (Pet. App. B 27a-29a) adopted the rationale of the *Milhollin* decision. In *Eaton* the district court ruled that "the conclusions reached by Judge Belloni [in *Milhollin*] should govern

3. The four cases were consolidated in the court of appeals. That court first held that the district courts had erred in finding that petitioner Ford Motor Credit Company was not adequately identified as a creditor on the face of the contracts (Pet. App. A 3a-8a). It therefore addressed the additional question whether petitioners' failure to disclose the acceleration clause violated the Truth in Lending Act.

On the authority of its earlier decision in *St. Germain* v. *Bank of Hawaii*, 573 F.2d 572 (9th Cir. 1977), the court of appeals agreed with the district courts' conclusion in *Milhollin* and *Eaton* that petitioner Ford Motor Credit Company violated the Truth in Lending Act and Regulation Z "by failing to dis-

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this case" because "[i]t has been the policy and practice of this Court to respect a fully considered opinion of another Judge of this Court * * * unless it appears that an obvious mistake has been made" and because the decision is "in accord with other federal court decisions" (Pet. App. B 28a).

Since the contract in *Eaton* was executed on June 28, 1975 (A. 65), subsequent to the February 1975 decision in *Woods*, the court in *Eaton* upheld the claim that petitioners' failure to disclose the acceleration clause violated the Act.

In the other two suits (*Messinger* v. *Ford Motor Credit Company, et al.* and *Andresen* v. *Ford Motor Credit Company, et al.* (Pet. App. B 30a-34a; 35a-39a)) the district courts did not address the question whether failure to disclose the acceleration clause violated the Act. They held for respondents on the ground that petitioner Ford Motor Credit Company was not adequately disclosed as a creditor under the contracts (Pet. App. B 31a, 36a-37a). Since the Act provides that multiple violations in connection with a single credit sale only entitle the borrower to a single recovery (see 15 U.S.C. 1640(g)) the district courts in these cases did not regard it necessary to decide the acceleration clause disclosure issue.

close an acceleration clause and its effect on unearned interest" (Pet. App. A 11a).[4] The court held in favor of respondents Millhollin and Eaton on the ground that the contracts in those cases failed to disclose petitioners' right of acceleration and to explain whether acceleration resulted in unearned interest.[5]

INTRODUCTION AND SUMMARY OF ARGUMENT

1. These cases present two important questions under the Truth in Lending Act (15 U.S.C. 1601 *et seq.*) with respect to which the courts of appeals are in disagreement, both with each other and with the Board of Governors of the Federal Reserve System, the agency directed by Congress to carry out the purpose of the Act by issuing regulations, interpretations, and official staff interpretations. The broad remedial purpose of the Act, the myriad forms in which credit transactions can occur, and the need

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[4] The court of appeals, however, disagreed with the district court's holding in those cases that the rule imposing liability for nondisclosure of an acceleration clause could not be applied to a contract that was executed prior to the district court's decision in *Woods* v. *Beneficial Finance Co., supra.* In the court of appeals' view, the district court exceeded its authority because "[t]he application of doctrines limiting the retroactivity of judicial decisions is restricted to appellate courts" [citation omitted] (Pet. App. A 9a).

[5] Since the sole ground of the district court's decision in *Messinger* and *Andresen* was the contracts' failure to identify adequately petitioner Ford Motor Credit Company as a creditor, the court of appeals remanded those cases for consideration of respondents' other claims not reached by the district courts (see Pet. App. A 11a).

for uniformity necessarily require that the statutory and regulatory interpretations of an expert agency such as the Board be given great weight. Such interpretations are the principal administrative tool employed by the Board to ensure uniform application and enforcement of the Act and Regulation Z. As this Court observed in *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 365 (1973), "To accomplish its desired objective, Congress determined to lay the structure of the Act broadly and to entrust its construction to an agency with the necessary experience and resources to monitor its operation." In rejecting the Board's Official Staff Interpretations with respect to the statutory questions involved in these cases, the decision below thwarts the congressional objective of providing uniform rules of credit disclosure practices.

Section 121 of the Act requires merchants who regularly extend credit, with attendant finance charges, to disclose "clearly and conspicuously, in accordance with the regulations of the Board" certain contract information "to each person to whom consumer credit is extended" (15 U.S.C. 1631(a)). Failure to disclose renders the seller liable to the consumer for a penalty of twice the amount of the finance charge, but in no event less than $100 or more than $1,000. Moreover, the maximum liability in a class action can be as much as $500,000 (15 U.S.C. 1640). The creditor may also be assessed for the costs of the litigation, including reasonable attorney's fees (*ibid.*), and may be subject to criminal penalties for willfully giving

false or inaccurate contract information or failing to give the required information (15 U.S.C. 1611). See *Mourning* v. *Family Publications Service, Inc., supra*, 411 U.S. at 361.

The Act prescribes certain disclosures that must be made by the merchant under retail installment contracts of the type involved in these cases. Specifically, the Act requires the creditor to disclose "[t]he default, delinquency, or similar charges payable in the event of late payments" (15 U.S.C. 1638 (a)(9)).

Pursuant to its general rulemaking authority "to carry out the purposes of [the Act]" (15 U.S.C. 1604), the Board has promulgated Regulation Z (12 C.F.R. 226), which defines and amplifies the circumstances in which a seller who regularly extends credit must make the disclosures required by the Act. The Regulation provides that "Any creditor when extending credit other than open end credit" must disclose "[t]he amount or method of computing the amount, of any default, delinquency, or similar charges payable in the event of late payments" (12 C.F.R. 226.8(a), (b)(4)).

The principal purpose of the Act is "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit" (15 U.S.C. 1601(a)). Regulation Z requires (12 C.F.R. 226.8(b)(7)):

> [i]dentification of the method of computing any unearned portion of the finance charge in the event of prepayment in full of an obligation which includes precomputed finance charges and

a statement of the amount or method of computation of any charge that may be deducted from the amount of any rebate of such unearned finance charge that will be credited to an obligation or refunded to the customer. If the credit contract does not provide for any rebate of unearned finance charges upon prepayment in full, this fact shall be disclosed.

2. Installment contracts typically grant the creditor the right to demand immediate payment of all installments upon the default of the borrower. Absent such a provision, commonly known as an acceleration clause, the creditor would be forced to sue as each installment became due and the borrower defaulted. Acceleration eliminates this time-consuming costly procedure.

Installment contracts also typically permit the borrower to prepay the obligations prior to the expiration of the terms of the loan. Because the finance charge is included in the amount of the debt at the inception of the contract, exercise of either the creditor's right to accelerate or the debtor's right to prepay in full requires a determination of the amount owing at the time the right is exercised. To determine the amount owed, it is necessary to compute how much of the finance charge added to the original debt (precomputed finance charge) has been earned and how much will be cerdited (rebated) to the consumer. This computation must be made whether the borrower discharges the obligation or whether the creditor seizes the collateral and sells it to satisfy the outstanding balance.

3. These cases present two questions under the Truth in Lending Act and Regulation Z dealing with acceleration of an installment obligation, with respect to which the Board has issued an Official Staff Interpretation. First, whether the Act requires the disclosure of the creditor's right to accelerate a debt upon default of the borrower. Second, whether the Act requires the creditor to disclose whether, and to what extent, he will rebate unearned finance charges to the borrower upon acceleration of the debt.

We submit that the Act does not require disclosure of the right of acceleration and that the decision below erred in so holding. The six other courts of appeals that have considered the question have agreed with the position of the Board staff, as expressed in its Official Staff Interpretation, that a right of acceleration is not a "default, delinquency, or similar charge[] payable in the event of late payments" (15 U.S.C. 1638(a)(9)) that is subject to disclosure under the Act.

The statute requires disclosure of "default, delinquency, and similar charges payable in the event of late payments." 15 U.S.C. 1638(a)(9), 1639(a)(7); see also 12 C.F.R. 226.8(b)(4). Although acceleration may eventually result in charges that are "payable" within the terms of the statute, the remedy itself cannot meaningfully be characterized as "payable." The charges specifically itemized in the statute —default and delinquency charges are terms of art referring to specific pecuniary sums that are owed in the event of late payments, not general creditor's remedies.

The legislative history also supports the view that the phrase "default, delinquency, or similar charges payable in the event of late payments" refers to specific monetary assessments upon the borrower that increase the cost of his credit transaction. The decision of the court below to the contrary is erroneous.

4. a. While the right of acceleration need not be disclosed, the Board staff recognized that the process of acceleration may subject the borrower to additional costs that must be disclosed if the consumer is to be "given the information he needs to compare the cost of credit and to make the best informed decision on the use of credit." H. R. Rep. No. 1040, 90th Cong., 1st Sess. 13 (1967). In determining whether such additional costs are subject to required disclosure under the Act, the Board staff took note that Regulation Z addressed the comparable problem of retention of unearned finance charges on the voluntary prepayment of a debt. Hence, if the creditor's policy on rebates of unearned finance charges upon payment after acceleration is the same as the creditor's policy already disclosed with regard to prepayments (see 12 C.F.R. 226.8(b)(7), *supra*, 2-3), the Board's position, expressed in its Official Staff Interpretation, is that the general prepayment disclosure provides sufficient description of the consequences of the equivalent process of acceleration. If, on the other hand, the policy is less favorable to the borrower, the Board staff has concluded that the difference is a charge peculiar to default that must be disclosed as a "default, delinquency, or similar charge[]" (15 U.S.C. 1638(a)(9)). See also 12 C.F.R. 226.8(b)(4).

b. The Board's Official Staff Interpretation reasonably implements the statutory policy of giving the consumer in the limited space available for setting forth the required disclosures, the information he needs to compare the cost of credit. The Board's interpretation, requiring disclosure of the method of rebating unearned interest on payment after acceleration only when it differs from the disclosed rebate policy for voluntary prepayment, is a proper exercise of its statutory responsibilities.

To be sure, the Board might have concluded, as did the court below, that disclosure of the effect of acceleration on rebate of unearned finance charges is required in all circumstances. But the fact that disclosure in all circumstances may be an equally reasonable alternative is beside the point and does not justify the court of appeals' substituting its judgment for that of the Board's staff. As this Court observed in *Mourning* v. *Family Publications Service, Inc., supra*, 411 U.S. at 371-372, with respect to the Board's rulemaking authority under the Truth in Lending Act, "That some other remedial provision might be preferable is irrelevant. We have consistently held that where reasonable minds may differ as to which of several remedial measures should be chosen, courts should defer to the informed experience and judgment of the agency to whom Congress delegated appropriate authority. *Northwestern Co.* v. *FPC*, 321 U.S. 119, 124 (1944); *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 224 (1943); *American Telephone & Telegraph Co.* v. *United States*, 299 U.S.

232, 236 (1936)." See also *United States* v. *Correll*, 389 U.S. 299, 306-307 (1967).

c. The court below rejected the Board's Official Staff Interpretation on the ground that the agency had "issued conflicting signals" (573 F.2d at 576). But the Board has consistently adhered to its interpretation since its original publication in 1974. The court of appeals misapprehended the import of the Board's rulings. And the Board's interpretation is surely no less reasonable than that of the decision below, which would require two separate and, to a considerable extent, duplicative statements explaining rebate policies.

The Board's interpretation is also at least as reasonable as the views of the other courts of appeals. In holding that the creditor's rebate policy on payment after acceleration is never required to be disclosed, the Eighth and Tenth Circuits have undermined the disclosure requirements of Regulation Z. The Third and District of Columbia Circuits have unrealistically attributed to the borrower a knowledge of state law. Finally, while the Fifth Circuit's approach most closely conforms to the official staff interpretation, it refuses to require disclosure of a creditor's unwritten policies when they differ from the contract and thereby fails to provide the borrower with the information that is most useful in comparing the cost of credit.

5. Because it is the agency charged with construing the Act, the Federal Reserve Board's interpretations of its Regulations are entitled to great

deference. Here, the rulings at issue are "official staff interpretations of the requirements of Regulation Z * * *" (Pet. App. D 52a). "When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order" (*Udall* v. *Tallman*, 380 U.S. 1, 16 (1965)).

Both the Board and Congress have accorded special status to the Official Staff Interpretations. They are issued by senior officials of the Board's Division of Consumer Affairs. And Congress has provided creditors with a defense of good faith conformity with "any interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the Board to issue * * * interpretations" (15 U.S.C. 1640(f)). It is therefore clear that Congress intended that the courts defer to Board staff interpretations with respect to the technical questions under the Truth in Lending Act. The contrary course would create undesirable uncertainties in credit transactions and seriously undermine administration and enforcement of the Act. Indeed, the failure of the courts to uphold the Board's interpretation with respect to the questions in this case had created different rules in the various states and destroyed the very uniformity of credit disclosure practices that the Act was designed to establish.

ARGUMENT

I. THE TRUTH IN LENDING ACT AND THE REGULATIONS THEREUNDER DO NOT REQUIRE THE DISCLOSURE OF THE CREDITOR'S RIGHT TO ACCELERATE A DEBT UPON DEFAULT OF THE BORROWER

A. A Right Of Acceleration Is Not A "Default, Delinquency, Or Similar Charge Payable In The Event Of Late Payments" Within The Meaning Of The Act

1. Section 128(a)(9) of the Act, 15 U.S.C. 1638 (a)(9), requires disclosure in the consumer credit transactions involved in these cases of "default, delinquency, or similar charges payable in the event of late payments." In amplification of the statute, Regulation Z provides for disclosure of "the amount, or method of computing the amount, of any default, delinquency, or similar charges payable in the event of late payments" (12 C.F.R. 226.8(b)(4)).

It is beyond dispute that these provisions require the disclosure of specific monetary assessments for late payment that add to the borrower's cost of credit. That is the accepted understanding of the terms "default [or] delinquency * * * charges." As the Third Circuit correctly pointed out in *Johnson* v. *McCrackin-Sturman Ford, Inc.*, 527 F.2d 257, 266 (1975), "In the commercial credit field and in other consumer credit legislation, the term 'delinquency charges' and 'default charges' generally refer to specific pecuniary sums that are assessed against the borrower solely because of his failure to make his payments in a timely manner. They are sums above

and beyond the amount ordinarily due in the event of timely payment."

However, creditor's exercise of the right of acceleration does not result in the imposition of any discrete charge on the debtor. It is a remedy that simply requires immediate payment of the outstanding balance due on the obligation. In no sense can the required payment of the balance due on an obligation be characterized as an "amount, or method of computing [an] amount, of * * * charges" within the meaning of Regulation Z.

Once it is recognized that a right of acceleration is not a "default [or] delinquency * * * charge[]," the only remaining statutory basis for requiring disclosure of the right of acceleration would be that it is a "similar charge". To be sure, acceleration does impose a pecuniary burden upon the borrower that could plausibly be described as a "charge".[6] But such an analysis overlooks the statutory context in which the word "charge" is placed and ascribes to it a meaning independent of its verbal moorings. It is not simply a "charge" that Congress subjected to disclosure but a "similar charge," *i.e.*, a charge "similar" to a "default [or] delinquency charge." As this Court has observed, a statutory word "does not stand alone, but gathers meaning from the words

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[6] The principal authority adopting this interpretation was *Garza* v. *Chicago Health Clubs, Inc.*, 347 F. Supp. 955 (N.D. Ill. 1972). However, the Seventh Circuit has recently rejected the reasoning of *Garza* and held that an acceleration right does not impose a "charge." See *Croysdale* v. *Franklin Savings Ass'n*, No. 78-1364 (7th Cir. July 12, 1979).

around it. * * * The maxim noscitur a sociis, that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Jarecki* v. *G. D. Searle & Co.*, 367 U.S. 303, 307 (1961). See also *National Muffler Dealers Ass'n* v. *United States*, No. 77-1172 (March 20, 1979) slip op. 13-14 & n.2. The statutory phrase "similar charge" therefore does not connote the right of acceleration.

B. The Legislative History And The Decisions Of The Courts Of Appeals Support The View That The Act Does Not Require Disclosure Of The Right To Accelerate

The legislative history of the Act confirms the correctness of the foregoing statutory construction. During its initial consideration of the legislation, Congress emphasized that the purpose of the Act was to disclose the cost of credit. Thus, for example, the Senate Banking Committee Report stated that "[a]ll installment creditors would be required to disclose the total cost of the credit in terms of dollars and cents and in terms of an annual percentage rate. In addition, all other charges incident to the transaction would be required to be set forth such as taxes, official fees, or insurance" (S. Rep. No. 392, 90th Cong., 1st Sess. 7 (1967). See also 114 Cong. Rec. 1849 (1968) (remarks of Rep. Cohelan); *id.* at 1446-1447 (remarks of Reps. Halpern, Daniels, and Hunt).[7]

[7] The congressional emphasis on disclosing the specific cost of credit is also reflected in the development of the statutory phrase "default, delinquency, or similar charges payable in the event of late payments" (15 U.S.C. 1638(a)(9)). The original Senate bill required the disclosure of "(8) the time and amount of payments scheduled to repay the indebtedness; and (9) the terms applicable in the event of advanced or delayed payments from those specified in (8) above" (S.5, 90th Cong., 1st Sess., § 4(a) (1967); 113 Cong. Rec. 14691 (1967)). The unofficial commentary accompanying the Senate bill equated the word "terms" with monetary assessments. It speaks of disclosure of "the time and amount of payments to repay the indebtedness and the terms (*penalties*) applicable in the event of payments advanced or delayed from those specified in the contract" (113 Cong. Rec. 2049 (1967) (emphasis supplied)). When the Senate Committee reported out the bill, it changed subsection (9) to require only the disclosure of "the default, delinquency, or similar charges in the event of late payments."

While there is no explanation for this change, the reasonable inference to be drawn is that the narrower amended version of the statute was intended to clarify the original congressional understanding that the disclosure requirements covered only specific monetary assessments triggered upon delinquency and not general remedies such as the right of acceleration. Indeed, the House Committee report accompanying the amended version of the statute supports this analysis. In commenting upon the disclosure requirements applicable to nonopen-end credit, it stated that "The number, amount, and due dates of the payments must also be disclosed, as well as any penalty for late payments" (H.R. Rep. No. 1040, 90th Cong., 2d Sess. 25 (1968).

The legislative history therefore supports the view that the phrase "default, delinquency, or similar charges payable in the event of late payments" includes only specific monetary assessments upon the borrower that increase the cost of his credit transaction. Since a non-quantifiable creditor's remedy such as acceleration does not by itself increase the cost of credit, it is not subject to required disclosure

as a "charge" under the Act.[8]

2. Without addressing the statutory language and legislative history discussed above, the court below ruled that the Act required the disclosure of an acceleration clause. In so holding, the court disregarded the uniform decisions of five circuits to the contrary, as well as the Official Staff Interpretation of the Board, that the right of acceleration is not a "default, delinquency, or similar charge payable in the event of late payments." *Johnson* v. *McCrackin-Sturman Ford, Inc.*, 527 F.2d 257 (3d Cir. 1975); *McDaniel* v. *Fulton National Bank of Atlanta*, 571 F.2d 948 (5th Cir. 1978) (en banc), clarified 576 F.2d 1156, 1157 (1978) (en banc); *Griffith* v. *Superior Ford*, 577 F.2d 455 (8th Cir. 1978); *Begay* v. *Ziems Motor Co.*, 550 F.2d 1244 (10th Cir. 1977); *Price* v. *Franklin Investment Co.*, 574 F.2d 594, 604

[8] This understanding of the legislative history has been adopted by both the Federal Reserve Board and by Senator Proxmire, one of the authors of the Act. In 1976, the Board recommended to Congress that the statute be amended to require only the disclosure of charges payable in the event of delinquency or late payment. The Board regarded the phrase "default charges" as misleading because it possibly referred to all charges that might be assessed upon default. See *Federal Reserve Board Annual Report*, App. C, p. 36 (1976).

In 1977, Senator Proxmire introduced a bill that would change the phrase "default, delinquency, or similar charges payable in the event of late payments" to read "[a]ny monetary charge payable in the event of a late payment or delinquency." S. 1312, 95th Cong., 1st Sess. § 11a(a)-(b) (1977); 123 Cong. Rec. S6021 (1977). The amendment is intended "to make clear that these provisions do not require disclosure of a creditor's right of acceleration upon default or other charges which are not monetary fees payable directly on default." 123 Cong. Rec. S6024 (daily ed. April 20, 1977).

(D.C. Cir. 1978).[9] See Public Information Letter No. 851 (Oct. 22, 1974), [1974-1977 Transfer Binder] Cons. Cred. Guide (CCH) ¶ 31,173, Pet. App. E 57a-58a). See also Official Staff Interpretation, No. FC-0054 (Apr. 4, 1977), 42 Fed. Reg. 18056 (1977), [1974-1977 Transfer Binder] Cons. Cred. Guide (CCH) ¶ 31,552, Pet. App. D 52a-53a; Public Information Letter No. 1324 (Nov. 14, 1978), [1974-1977 Transfer Binder] Cons. Cred. Guide (CCH) ¶ 31,827, Pet. App. G 61a-63a. See also Comment, *Acceleration Clause Disclosure Under the Truth in Lending Act*, 77 Colum.L.Rev. 649, 651-659 (1977).

St. Germain v. *Bank of Hawaii*, 573 F.2d 572 (1977), an earlier decision of the Ninth Circuit by which the court below regarded itself bound (Pet. App. A 8a-9a, 11a), is not to the contrary. The court in that case did not hold that the right of acceleration clause was subject to disclosure under the Act. Rather, it appears to have agreed with the Board's Official Staff Interpretation, No. FC-0054

[9] The Seventh Circuit has now likewise held that a right of acceleration is not a "charge" subject to disclosure. See *Croysdale* v. *Franklin Savings Association, supra.* The Fifth Circuit has adhered to its view that disclosure of the mere right of acceleration is not required but that the creditor's policy of rebating unearned finance charges upon payment after acceleration must be disclosed if it is less favorable to the borrower than the policy for such rebates upon voluntary prepayment. See *Kennedy* v. *Plaza Pontiac, Inc.*, 589 F.2d 161 (5th Cir. 1979); *Burley* v. *Bastrop Loan Co.*, 590 F.2d 160 (5th Cir. 1979). The Tenth Circuit continues to hold that no disclosures are ever required with respect to an acceleration clause. See *United States* v. *One 1976 Chevrolet Station Wagon*, 585 F.2d 978 (10th Cir. 1978).

supra, Pet. App. D 52a-53a, that the statutory phrase "default, delinquency, or similar charges in the event of late payments" refers to specific sums assessed against the borrower so that "[t]he mere right to accelerate contained in a contractual provision * * * is not a *charge* payable in the event of late payment" (emphasis in original) (see 573 F.2d at 574).[10] There is accordingly no convincing basis in the terms of the statute, the legislative history, or even in the prior decisions of the Ninth Circuit, for the conclusion of the decision below that a right of acceleration, without more, is required to be disclosed under the Act. The court below therefore erred in finding a violation of the Act on the ground of petitioners' "failure to disclose the acceleration clause" (Pet. App. A 9a).

[10] Despite its agreement that it should follow the Board's construction "unless there are compelling indications that it is wrong" and that "[n]o compelling indications of error are present" (573 F.2d at 574), the Ninth Circuit in *St. Germain* purported to follow its earlier decision in *LaGrone* v. *Johnson*, 534 F.2d 1360 (1976), which held that a debtor was entitled to rescind a credit transaction because the creditor had failed to disclose an acceleration clause. But the court in *St. Germain* acknowledged that its earlied decision "assumed, without discussion, that disclosure was required" (573 F.2d at 576 n. 4). The issue litigated in *LaGrone* was whether disclosure in the underlying note, rather than in the disclosure section of the contract, satisfied the Act (see 534 F.2d at 1362).

We deal with the aspect of *St. Germain* pertaining to disclosure of the creditor's policy on rebate of unearned finance charges upon payment after acceleration at pages 26-27, *infra*.

II. THE TRUTH IN LENDING ACT AND THE REGULATIONS REQUIRE THE DISCLOSURE OF THE REBATE OF UNEARNED FINANCE CHARGES UPON ACCELERATION OF THE DEBT ONLY WHEN SUCH REBATE IS LESS FAVORABLE TO THE BORROWER THAN THE DISCLOSED REBATE DUE UPON VOLUNTARY PREPAYMENT

A. The Federal Reserve Board Official Staff Interpretation With Respect To Disclosure Of The Rebate Upon Acceleration Is Supported By The Language Of The Act And Regulations And Reasonably Furthers The Congressional Purpose Of Informing The Borrower Of The Cost Of Credit

1. The extent to which the creditor will rebate unearned finance charges in the event of early termination of an installment contract in which the finance charge is included in the debt, is an important consideration in comparing the cost of credit. Hence, even though the Act is silent on the question of disclosure of such rebates, the Board has promulgated Regulation Z which requires the creditor to identify "the method of computing any unearned portion of the finance charge in the event of prepayment in full of an obligation" or to disclose the fact that "the credit contract does not provide for any rebate of unearned finance charges upon prepayment * * *" (12 C.F.R. 226.8(b)(7)).

By means of an Official Staff Interpretation, the Board has construed this provision of Regulation Z to require separate disclosure of the creditor's rebate policy upon payment after acceleration only when such rebate is less favorable to the borrower than the amount that would have been rebated under the

disclosed prepayment rebate policy. Under this official interpretation, the difference between the acceleration rebate and the prepayment rebate represents a "default, delinquency, or similar charge[] payable in the event of late payments" (15 U.S.C. 1638(a)(9)) that is subject to required disclosure under the Act and Regulation Z (12 C.F.R. 226.8(b)(4)). See Pet. App. D 53a; Pet. App. E 57a-58a.

This construction is entirely consistent with the Act and Regulation Z. It is any additional amount retained by the creditor upon acceleration above and beyond the amount retained upon voluntary prepayment that is a "charge" peculiar to acceleration upon default. On the other hand, if there is no difference between the disclosed rebate on voluntary prepayment and that upon acceleration then there is no charge that is peculiar to the borrower's default and no need for further disclosure.

Moreover, the Board's position carries out the congressional purpose of informing the borrower of the cost of credit. If the rebate in the event of voluntary prepayment and payment after acceleration is the same and the creditor discloses the rebate policy with respect to voluntary prepayment, there is no significant public policy served by providing the borrower with a redundant separate disclosure of the rebate policy on acceleration, as the Ninth Circuit required in *St. Germain* and the instant cases.

Finally, the Official Staff Interpretation represents a practical accommodation of the policy of providing

the borrower with the most important information in the limited space available for disclosures under the Act. In order to make it more likely that the borrower will actually read the items subject to disclosure, the Board requires that the prescribed statements "be made together on either: (1) The note or other instrument evidencing the obligation on the same side of the page and above the place for the customer's signature, or (2) [o]ne side of a separate statement which identifies the transaction" (12 C.F.R. 226.8(a)). The Board Staff could therefore reasonably interpret the Regulations in favor of excluding redundant information from required disclosure when the effect of such disclosure would be to discourage the consumer from reading the material.[11] See *Croysdale* v. *Franklin Savings Association*, *supra*, slip op. 11.

In sum, the Board has reasonably ruled that compared to certain other credit terms, the creditor's

[11] Indeed, the Board has recommended, and Congress is now considering, legislation to modify the disclosure requirements to avoid providing so much detail that the consumer is dissuaded from reading anything. In its report on the Truth in Lending Simplification and Reform Act (S. 108, 96th Cong., 1st Sess. (1979)), the Senate Committee on Banking, Housing, and Urban Affairs recently stated (S. Rep. No. 96-73, 96th Cong., 1st Sess. 2 (1979)): "There is considerable evidence * * * that disclosure forms given consumers are too lengthy and difficult to understand." The Committee further noted that it is necessary, but difficult to "balance[] the competing considerations of complete disclosure so that the consumer is fully informed and the need to avoid providing so much information that the consumer is discouraged from studying it" (*id.* at 3).

rebate policy after payment resulting from default and acceleration is not so important as to justify duplicative disclosure statements. As long as the rebate on payment after acceleration is the same as upon voluntary prepayment, the disclosures already provided on prepayment rebates offer the borrower sufficient and accurate information.

2. In rejecting the rationale of Official Staff Interpreparation, No. FC-0054, *supra*, the Ninth Circuit in *St. Germain* concluded that the agency staff ruling was not entitled to great weight because the Board had "issued conflicting signals" (573 F.2d at 576) in its construction of the Act and Regulation Z. In the court's view, the interpretations were contradictory because they addressed the acceleration disclosure question on the assumption that acceleration was equivalent to prepayment and also in terms of the statutory term "charge."

But the "prepayment" and the "charge" analyses are not mutually exclusive. Payment resulting from acceleration is, as the Board staff has correctly concluded, comparable to voluntary prepayment, which similarly involves early discharge of the loan obligation. Since the creditor's rebate policy on prepayment is already subject to disclosure, the Board staff has consistently interpreted Regulation Z since 1974 (see Pet. App. E 57a) to require a separate disclosure statement with respect to payment after acceleration only when the rebate in that event is different than the prepayment rebate. When the rebate in the case of payment resulting from acceleration is less than the prepayment rebate, acceleration results in a

"charge" peculiar to the borrower's default that is subject to disclosure under the Act. This interpretation is surely no less reasonable than that of the Ninth Circuit, which would require two separate and, to a considerable extent, duplicative statements explaining rebate policy without regard to whether the consumer will actually benefit from them.

B. The Board's Official Staff Interpretation Is At Least As Reasonable As The Decisions Of The Various Courts Of Appeals

The official staff construction is likewise at least as reasonable as the views of the other courts of appeals. The Tenth and Eighth Circuits have held that the creditor's rebate policy on payment after acceleration is never required to be disclosed. In *Begay* v. *Ziems Motor Co., supra*, 550 F.2d at 1247-1249, the Tenth Circuit concluded that prepayment and the right of acceleration were "conceptually antithetical" because "[t]he former is the unilateral act of the debtor; [while] the latter is the unilateral act of the creditor" (539 F.2d at 529). But this observation overlooks the fact that both voluntary prepayment and payment after acceleration involve early payment of the debt.

The Eighth Circuit's decision employs a similarly erroneous analysis. In *Griffith* v. *Superior Ford, supra*, 577 F.2d at 459-460, that court declined to construe the prepayment disclosure provision of Regulation Z (12 C.F.R. 226.8(b)(7)) to require disclosure of the creditor's rebate policy upon acceleration. As the court stated, "We are unwilling to usurp the prerogatives of the Board" (577 F.2d at 460). But in so narrowly construing Regulation Z, the court

focused only upon the situation where the creditor's rebate policy upon payment after acceleration is the same as the disclosed policy upon voluntary prepayment (see *id.* at 460 n.6). It thus failed to take into account the case where the creditor has a more onerous rebate policy upon payment following acceleration, which results in a "charge" peculiar to default.

The Third and District of Columbia Circuits have likewise failed to consider the practicalities inherent in the typical consumer credit transaction. Those courts have held that where the contract or state law requires a rebate of unearned interest, the state law becomes part of the contract and the creditor need not disclose his rebate policy. See *Johnson* v. *McCrackin-Sturman Ford, Inc., supra,* 527 F.2d at 267-268; *Price* v. *Franklin Investment Co., supra,* 574 F.2d at 604-605. But the fact that state law may govern a particular credit contract begs the question whether a creditor's rebate policy is subject to required disclosure as a "charge" peculiar to default. The rule of these cases fails to consider the case where the rebate policy upon payment after acceleration is less favorable to the borrower than the policy upon voluntary prepayment. Moreover, these decisions impractically attribute to the borrower a knowledge of the state law, an assumption squarely at odds with the disclosure policies underlying the Act.

The appellate authority that comes closest to upholding the Board's Official Staff Interpretation No. FC-0054 is the Fifth Circuit's *en banc* decision in *McDaniel* v. *Fulton National Bank of Atlanta,* 576

F.2d 1156 (1978). There, the court agreed with the Board's ruling that a mere right of acceleration upon default is not a "charge" and need not be disclosed. It further held that an "additional disclosure of rebate provisions of unearned interest in the event of default need not be made if these are the same as disclosed rebate provisions in the event of voluntary prepayment" (*id.* at 1157). But the Fifth Circuit's approach goes beyond the view expressed in Official Staff Interpretation, No. FC-0054 in one significant respect. The court concluded that "if the creditor possesses under his contract the right to retain more unearned interest in the event of accelerated payment pursuant to default than in that of voluntary prepayment, or if he possesses the right to impose any additional charge whatever in the event of default, then the existence of that right in him must be disclosed—and this entirely without regard to whether or how he *exercises* that right in the event" (emphasis in original) (*ibid.*).

To be sure, the Fifth Circuit's requirement of disclosure of the creditor's contractual rights will inform the borrower of his maximum potential liability under the arrangement. But it is more important that the borrower understand what the creditor will actually do upon default. Thus, for example, the Board staff has reasonably concluded that where the contract is silent, it is "the individual creditor's policy [that] determines whether there is a violation of the Act and regulation." Public Information Letter No. 1208 (July 6, 1977), [1974-1977 Transfer Binder] Cons.

Cred. Guide (CCH) ¶ 31,647, Pet. App. F 60a. So too, if the creditor's policy is not to enforce certain of his contractual rights, that policy should likewise be subject to disclosure under the Act. The Fifth Circuit's approach fails to provide the borrower with the information most useful to him in comparing the cost of credit, viz., the creditor's actual practices, by including such practices in the disclosure statement.

III. AS THE AGENCY CHARGED WITH CONSTRUING THE ACT, THE FEDERAL RESERVE BOARD'S INTERPRETATIONS OF ITS REGULATIONS ARE ENTITLED TO DEFERENCE

A. We submit that the foregoing discussion demonstrates that the Board's Official Staff Interpretation with respect to disclosure of a creditor's unearned finance charge rebate policy upon payment after acceleration is, at the least, no less reasonable than any of the views of the courts of appeals. As we have pointed out (*supra*, pages 13-18), it is not necessary to show that the agency's interpretation is preferable to any other solution to the problem. This Court has "consistently held that where reasonable minds may differ as to which of several remedial measures should be chosen, courts should defer to the informed experience and judgment of the agency to whom Congress delegated appropriate authority." *Mourning* v. *Family Publications Service, Inc.*, *supra*, 411 U.S. at 371-372. Here, Congress has enacted remedial legislation and conferred broad rulemaking authority upon the Federal Reserve Board, the agency expert in the myriad forms of credit transactions (15 U.S.C. 1604). Its

interpretation should therefore be upheld if it is "reasonably related to the purposes of the enabling legislation" (*Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. 268, 280-281 (1969) and "within the bounds of [its] administrative powers" (*American Telephone & Telegraph Co.* v. *United States*, 299 U.S. 232, 236 (1936)). See also *American Trucking Ass'ns* v. *United States*, 344 U.S. 298 (1953).

If the Board had promulgated its policy governing disclosure of acceleration rights and attendant rebate of unearned interest in the form of a Regulation, there would be no question that its views would be entitled to deference. As this Court noted in *Mourning* v. *Family Publications Service, Inc.*, *supra*, 411 U.S. at 365, 368, in upholding the "Four Installment Rule" of Regulation Z, "in addition to granting to the Board the authority normally given to administrative agencies to promulgate regulations designed to 'carry out the purposes' of the Act, Congress specifically provided * * * that the regulations may define classifications and exceptions to insure compliance with the Act (footnote omitted)" (see 15 U.S.C. 1604).

But the fact that the Board's rulings with respect to the questions presented in this case took the form of an Official Staff Interpretation does not reduce their significance as the views of an expert agency. The rulings of the Board at issue here are "official staff interpretations of the requirements of Regulation Z * * *" (Pet. App. D 52a) to which Congress

itself has accorded special status. In 1974, Congress amended the Act (Pub. L. No. 93-495, Section 406, 88 Stat. 1518) to insulate creditors from civil and criminal liability if they acted in good faith reliance upon the Board's interpretations. The 1974 amendment provided (15 U.S.C. 1640(f)):

> No provision of this section [relating to civil liability] or section 112 [relating to criminal liability] shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Board, notwithstanding that after such act or omission has occurred, such rule, regulation, or interpretation is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

As the Senate Report accompanying this provision [12] explained (S. Rep. No. 93-278, 93d Cong., 1st Sess. 13-14 (1973)): "The Truth in Lending Act is highly technical and the Committee does not have believe a creditor should be forced to choose between the Board's construction of the Act and the creditor's own assessment of how a court may interpret the Act."

In 1976, Congress determined that insulating creditors from liability for good faith reliance upon the

[12] The provisions were reported by the Senate Committee as part of S. 2101 (see S. Rep. No. 93-278, 93d Cong. 1st Sess. (1973)), and were later incorporated by the Senate in floor amendments to the bill, H.R. 11221, that was enacted, with amendments, as Pub. L. No. 93-495. See 120 Cong. Rec. 19209-19214 (1974).

Board's rules, regulations, or interpretations did not provide sufficient certainty with respect to the host of technical disclosure questions covered by opinions issued by the Board's staff. Congress therefore again amended the Act by extending the immunity for good faith reliance upon Board interpretations to any act done or omitted in good faith "in conformity with any interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the Board to issue such interpretations or approvals under such procedures as the Board may prescribe therefor * * *" (Pub. L. No. 94-222, Section 3b, 90 Stat. 197, amending 15 U.S.C. 1640(f)).[13] In explaining the provision to the House, Representative Annunzio, Chairman of the Subcommittee on Consumer Affairs of the House Committee on Banking, Currency and Housing, stated as follows (122 Cong. Rec. 11280 (1976)):

> Creditors are often hit with costly lawsuits for unintentional technical violations because, even though they attempt to comply, the laws and regulations are too complicated and ambiguous. * * *
>
> *With formal advisory opinions, creditors will at last have a reliable way to know how to com-*

[13] Although petitioners claimed that the 1976 amendment absolved them from liability because they acted in conformity with the Official Staff Interpretation, the court of appeals did not address this question. The Board has not yet ruled as to the effect of 1976 amendment on contracts entered into prior to its enactment. See generally, *e.g.*, Public Information Letter No. 638 [1969-1974 Transfer Binder] Cons. Cred. Guide (CCH) ¶ 30,897.

> *ply with Truth in Lending.* Consumers should benefit because creditors will no longer be able to explain away violations by claiming they could not find out how to comply. Consumers, creditors, and the Board should find they are involved in less litigation (emphasis supplied).

See also 122 Cong. Rec. 2852 (1976) (remarks of Reps. Annunzio and Rousselot); *id.* at 2836 (remarks of Sen. Garn).

The legislative history accompanying the 1976 amendments therefore demonstrates beyond question that Congress intended to eliminate challenges of the type involved in this case. By immunizing creditors who conform to the Board's rulings, Congress intended that the courts defer to the Federal Reserve Board with respect to the technical questions arising under the Truth in Lending Act, whether the Board issues its rules in the form of Regulations or Official Staff Interpretations.

B. Given "the myriad forms in which credit transactions [can] occur[]" (*Mourning* v. *Family Publications Service, Inc., supra,* 411 U.S. at 365) and the potential for imposition of both civil and criminal penalties for violations of the Act, the need for Official Staff Interpretations to provide certainty to creditors is self-evident. This case illustrates the fact that no set of Regulations, no matter how detailed, could speak to every available type of credit arrangement. The Board therefore early recognized that it would be necessary to provide creditors with technical guidance to elaborate upon the meaning of

the Regulations. As a result, the Board began to issue interpretations of the Regulations even before the July 1, 1969 effective date of the Regulations. See 12 C.F.R. 226.101 *et seq.* Moreover, in 1969, the Board's staff began to issue Public Information Letters explaining the application of the Act and Regulation Z to specific types of credit transactions. See [1969-1974 and 1974-1977 Transfer Binders] Cons. Cred. Guide (CCH).[14]

The Board's Official Staff Interpretations and Public Information Letters play a vital role in its administration of the Act. As the Board recognized in 1971, three years after passage of the Act, its staff opinions "were an essential part of its operations" and "the public [was] entitled to rely on a formal staff opinion unless and until it is altered by the Board after formal consideration." Public Information Letter No. 444 [1969-1974 Transfer Binder] Cons. Cred. Guide (CCH) ¶ 30,640.[15] And after

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[14] Since the passage of the Act in 1969, the Board's staff has issued 1,342 Public Information Letters and approximately 160 Official Staff Interpretations explaining and applying the Act and Regulation Z.

[15] In Public Information Letter No. 444, the Deputy Secretary of the Board stated:

* * * *

> A staff opinion represents the informed view of the particular official responding to the inquiry, who is authorized by the Board to express opinions on the particular subject. While it is possible that in some instances it might not represent the position which the Board members themselves would take if they formally considered the issue, the Board considers the present informal and flexible procedure, by which members of its staff provide

Congress accorded enhanced status to the Board's Official Staff Interpretations upon enactment of the 1976 amendment, the Board designated "the Director and other officials of the Division of Consumer Affairs as officials 'duly authorized' to issue, at their discretion, official staff interpretations * * *" (12 C.F.R. 226.2(d)(3), Appendix, *infra*, 2a. Indeed, Official Staff Interpretation, No. FC-0054, *supra*, Pet. App. D 52a-56a, which addresses the two questions presented in this case, was issued pursuant to this procedure.[16]

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opinions on regulatory provisions, an essential part of its operations.

It is the Board's view that the public is entitled to rely on a formal staff opinion unless and until it is altered by the Board after formal consideration. Where the issue involves a statement of legal position, it may be assumed that while the question discussed has not been presented to, nor reviewed by the Board, such view is believed by the staff to be legally sound and judicially sustainable, and would be recommended by the staff for Board adoption should the matter be presented to the Board. * * *

[16] At the time Office Staff Interpretation, No. FC-0054 was issued, the Regulations provided that the type of interpretation issued by the Board and designated officials would be determined by the following criteria (12 C.F.R. 226.1(d)(4) (1977), Appendix, *infra*, 2a-3a):

(i) Official Board interpretations will be issued upon those requests which involve potentially controversial issues of general applicability dealing with substantial ambiguities in this Part and which raise significant policy questions.

(ii) Official staff interpretations will be issued upon those requests which, in the opinion of the designated official, require clarification of technical ambiguities in this Part or which have no significant policy implications.

(iii) Unofficial staff interpretations will be issued where the protection of section 130(f) of the Act is neither requested nor required, or where time strictures require a rapid response.

Interpretations could be reconsidered by the Board upon request of a member of the public (12 C.F.R. 226.1(d)(2) (1977)).

The Regulation was amended in April 1978, to permit requests for public comment within 30 days of publication of the interpretation. The effective date of the interpretation is deferred for at least 30 days to permit the submission of such requests. See 43 Fed. Reg. 18539-18540 (1978), amending 12 C.F.R. 226.1(d), Appendix, *infra*, 3a-4a.

C. In light of the careful consideration that accompanies the issuance of the Board's Staff Interpretations and the importance that Congress attributes to them, the confidence with which the courts have regarded such rulings is understandable. Indeed, apart from the decisions dealing with the questions presented in this case, the courts of appeals have generally accorded appropriate deference to the Staff Interpretations of the Board. See *e.g.*, *Gantt* v. *Commonwealth Loan Co.*, 573 F.2d 520, 522-524 (8th Cir. 1978); *Bone* v. *Hibernia Bank*, 493 F.2d 135, 140 (9th Cir. 1974); *Philbeck* v. *Timmers Chevrolet, Inc.*, 499 F.2d 971, 976-977 (5th Cir. 1974); *Croysdale* v. *Franklin Savings Association*, *supra*, slip op. 7 n. 4. See also *Johnson* v. *McCrackin-Sturman Ford, Inc.*, *supra*, 527 F.2d at 267-268.[17]

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[17] In *St. Germain*, the Ninth Circuit prefaced its consideration of Official Staff Interpretation, No. FC-0054, with the following observation (573 F.2d at 574) (emphasis supplied): "Although we are not bound by the Board's official interpreta-

Here, the Board staff concluded, in light of its specialized experience, that Regulation Z requires the disclosure of a creditor's rebate policy on unearned interest upon payment after acceleration only if it is less favorable to the borrower than the rebate policy upon voluntary prepayment, which is already subject to disclosure. The appraisal of the relative importance of various contract terms to prospective borrowers and the determination of the most useful method of informing the borrower of the cost of credit involve precisely the sorts of policy decisions that Congress intended to leave to the special expertise of the Board and its staff. There is accordingly no basis for the court of appeals' rejection of the Board's Official Staff Interpretation, No. FC-0054 in this case. As this Court admonished in *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965), "[w]hen the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order." Accord: *Bowles* v. *Seminole Rock Co.*, 325 U.S. 410, 413-414 (1945); *Investment Co. Institute* v. *Camp*, 401 U.S. 617, 626-627 (1971); *United States* v. *National Ass'n of Securities Dealers, Inc.*, 422 U.S. 694, 717-719 (1975).

tion of Regulation Z nor by a staff opinion letter, both are entitled to respect; we should follow the Board's construction 'unless there are compelling indications that it is wrong.' (*Moore* v. *Great Western Savings & Loan Ass'n* (9th Cir. 1975) 513 F.2d 688, 690). *No compelling indications of error are present*" (emphasis supplied).

In sum, this case graphically shows that failure of the courts to uphold the Board's Official Staff Interpretations will seriously undermine administration of the Act. With respect to the questions presented as to the right of acceleration and the attendant rebate of unearned interest, the disarray among the courts of appeals has resulted in different disclosure rules in the various states, and destroyed the very uniformity of credit disclosure practices that the Act was designed to establish.[18] The congressional promise of "assur[ing] a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him * * *" (15 U.S.C. 1601(a)) will be thwarted if the various courts feel free to "choose the direction

[18] Judicial rejection of the Board's Official Staff Interpretations will also prevent effective enforcement of the Act and Regulations. While the Board is charged with promulgating Regulations to implement the Act (15 U.S.C. 1604), the Act provides for administrative enforcement, depending on the type of creditor, by the Comptroller of the Currency, the Federal Reserve Board, the Federal Deposit Insurance Corporation, the Federal Home Loan Bank Board, the National Credit Union Administration, the Civil Aeronautics Board, the Secretary of Agriculture, the Farm Credit Administration, and the Federal Trade Commission (15 U.S.C. 1607). If the courts decline to uphold official staff interpretations, the numerous agencies that periodically examine institutions for compliance with consumer protection laws face a far more difficult task. The Board and four of the enforcing agencies have recently adopted uniform enforcement guidelines in an attempt to improve enforcement (see 44 Fed. Reg. 1222 (1979)), but this effort will be hampered if the agencies cannot rely with confidence upon the Board's Official Staff Interpretations.

that makes more sense to [them] * * *" (573 F.2d at 576-577). Only by judicial deference to the Board's Official Staff Interpretations can that congressional promise be achieved.

CONCLUSION

The judgments of the court of appeals in *Milhollin* and *Eaton* should be reversed. The judgments of the court of appeals in *Messinger* and *Andresen*, remanding the cases for consideration of issues not yet decided, should be affirmed.[19]

Respectfully submitted.

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SEPTEMBER 1979

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[19] Since it is undisputed in the *Milhollin* and *Eaton* cases, that petitioners' rebate policy upon payment after acceleration was the same as its disclosed policy upon voluntary prepayment (see A. 22, 68; page 5, note 2, *supra*), a decision by this Court upholding the Board's Official Staff Interpretation disposes of respondents' remaining claims in those cases. However, in the *Messinger* and *Andresen* cases, the district court has yet to rule upon respondents' acceleration disclosure claims (see pages 5-6, note 3, *supra*).

APPENDIX

Section 105 of the Truth in Lending Act (15 U.S.C. 1604) provides:

> The Board shall prescribe regulations to carry out the purposes of this subchapter. These regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.

Section 130 of the Act was amended in 1974 by Pub. L. No. 93-495, Section 406, 88 Stat. 1518, as follows:

> (f) No provision of this section [Civil Liability] or section 112 [Criminal Liability] shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Board, notwithstanding that after such act or omission has occurred, such rule, regulation, or interpretation is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

In 1976, Section 130(f) of the Act (15 U.S.C. 1640(f)) was expanded to include staff interpretations:

> (f) No provision of this section or section 1611 of this title imposing any liability shall apply to any act done or omitted in good faith

in conformity with any rule, regulation, or interpretation thereof by the Board or in conformity with any interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the Board to issue such interpretations or approvals under such procedures as the Board may prescribe therefor, notwithstanding that after such act or omission has occurred, such rule, regulation, interpretation, or approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

The Board implemented the 1976 amendment, 42 Fed. Reg. 2950 (Jan. 14, 1977), by adopting Section 226.1(d)(3) of Regulation Z, which read:

(3) Pursuant to section 130(f) of the Act, the Board has designated the Director and other officials of the Division of Consumer Affairs as officials 'duly authorized' to issue, at their discretion, official staff interpretations of this Part. This designation shall not be interpreted to include authority to approve particular creditors' forms in any manner.

(4) The type of interpretation issued will be determined by the Board and the designated officials by the following criteria:

(i) Official Board interpretations will be issued upon those requests which involve potentially controversial issues of general applicability dealing with substantial ambiguities in this Part and which raise significant policy questions.

(ii) Official staff interpretations will be issued upon those requests which, in the opinion of the designated officials, require clarification

of technical ambiguities in this Part or which have no significant policy implications.

(iii) Unofficial staff interpretations will be issued where the protection of section 130(f) of the Act is neither requested nor required, or where time strictures require a rapid response.

On April 21, 1978, the Board revised its procedures for issuance of official staff interpretations to read as follows (see 43 Fed. Reg. 18539-18540 (1978)):

226.1(d) *Issuance of staff interpretations.* (1) Unofficial staff interpretations will be issued at the staff's discretion where the protection of section 130(f) of the Act is neither requested nor required, or where a rapid response is necessary.

(2)(i) Official staff interpretations will be issued at the discretion of designated officials. No such interpretation will be issued approving creditors' or lessors' forms or statements. Any request for an official staff interpretation of this Part must be in writing and addressed to the Director of the Division of Consumer Affairs, Board of Governors of the Federal Reserve System, Washington, D.C. 20551. The request must contain a complete statement of all relevant facts concerning the credit or lease transaction or arrangement and must include copies of all pertinent documents.

(ii) Within 5 business days of receipt of the request, an acknowledgment will be sent to the person making the request. If, in the opinion of the designated officials, issuance of an official staff interpretation is appropriate, it will be pub-

lished in the Federal Register to become effective 30 days after the publication date. If a request for public comment is received, the effective date will be suspended. The interpretation will then be republished in the Federal Register and the public given an opportunity to comment. Any official staff interpretation issued after opportunity for public comment shall become effective upon publication in the Federal Register.

(3) Any request for public comment on an official staff interpretation of this Part must be in writing and addressed to the Secretary, Board of Governors of the Federal Reserve System, Washington, D.C. 20551, and postmarked or received by the Secretary's office within 30 days of the interpretation's publication in the Federal Register. The request must contain a statement setting forth the reasons why the person making the request believes that public comment would be appropriate.

(4) Pursuant to section 706(e) of the Act, the Board has designated the Director and other officials of the Division of Consumer Affairs as officials 'duly authorized' to issue, at their discretion, official staff interpretations of this Part.

☆ U. S. GOVERNMENT PRINTING OFFICE; 1979 300445 70

In the
Supreme Court of the United States

October Term, 1978

No. 78-1487

FORD MOTOR CREDIT COMPANY, et al.,
PETITIONERS,

v.

DENNIS MILHOLLIN, et al.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF NATIONAL CLIENTS COUNCIL, INC.,

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BRIEF AMICUS CURIAE OF NATIONAL CLIENTS COUNCIL, INC.,

Interest of Amicus Curiae

National Clients' Council, Inc., is a non-profit corporation representing low-income clients of publicly and privately-funded legal service organizations. Low-income clients

* Although the case has been captioned as such, the proper spelling of Respondents' surname is "Millhollin."

from all regions of the United States elect the Board of Directors of National Clients Council, Inc., at least two-thirds of whom must be low-income persons eligible for legal representation by the legal services organizations. These low-income clients are directly and uniquely affected on a consistent and continuous basis by the operation and enforcement of the Truth in Lending Act and Regulation Z in general, and by the contractual acceleration clause in particular.

Express consent to file this brief *amicus curiae* has been given by all parties to this suit. The original letter from each counsel is filed herewith.

Statement of Facts

The issue in this case is whether Petitioner Ford Motor Credit Company (hereinafter FMCC) violated the Truth in Lending Act by failing to disclose in its consumer credit contracts with Respondents Mr. and Mrs. Milhollin and with Respondent Donna Eaton the full charges payable upon failure to make timely payment.

Under the contracts, Mr. and Mrs. Milhollin purchased a car and agreed to pay $85.68 on the 29th of each month and Donna Eaton agreed to pay $103.64 on the 9th of each month. Pet.App. 9, 65. If either failed to make payment FMCC could accelerate the maturity of the contract and demand a charge of immediate payment of the entire unpaid balance including unearned interest, up to $3,084.64 in Mr. and Mrs. Milhollin's case and up to $3,731.04 in Donna Eaton's case A. 10, 66. Or FMCC could instead demand payment of a delinquency charge of $4.93 under the Milhollin contract and $5.00 under Donna Eaton's contract for each unpaid installment. FMCC disclosed its right to demand the delinquency charge of up to $5 in large print on the front of the contract. A. 9, 65. FMCC put its right

to charge the unpaid balance in minute print on the back of the contract. A. 10, 66.

When Mr. and Mrs. Milhollin both became unemployed and missed two payments and when Donna Eaton missed a payment, FMCC accelerated the maturity of the contracts and without notice repossessed their cars which secured the credit contracts. A. 27. Although Mr. and Mrs. Milhollin offered to pay FMCC the $171.36 delinquency FMCC demanded in its post-repossession notice, FMCC refused to return the car unless Mr. and Mrs. Milhollin paid the full $2,440.42. A. 21. FMCC claims that it has a policy of rebating all unearned interest but $15, Petitioners' Brief at 6, and that $2,415.92 of that $2,440.42 represents the unpaid balance minus a full credit of unearned interest.[1] In fact, FMCC appears to have kept $28.01 in unearned interest, see Section IIB. Mr. and Mrs. Milhollin could not tender the full unpaid balance and their repossessed car was sold by FMCC.

Summary of the Argument

Section 128(a)(9) of the Truth in Lending Act and §226.8(b)(4) of Regulation Z both require the disclosure of "default, delinquency, and similar charges payable upon late payments." Ford Motor Credit Company claims the contractual right to impose four of these charges against the Milhollins and Eaton: immediate payment of the full unpaid balance; the contractual right to retain unearned finance charges, actually exercised in the Milhollins' case; a $15 acquisition charge; and a delinquency charge of up to $5. FMCC chose to disclose only its right to impose the least consequential $5 delinquency charge. It chose not to disclose the far more important rights to impose the other three charges. These three charges are payable upon acceleration for default occasioned by late payment and

[1] The remaining $24.50 is a repossession expense.

thus must be disclosed under the plain meaning of the Act and Regulation Z.

Disclosure of these default charges is necessary to further the fundamental Truth in Lending policy of informed use of credit. Since imposing immediate payment of the full unpaid balance is far from universal, but has a devastating impact when imposed, its disclosure allows consumers to shop for creditors who do not use the term, and to take that term into account when managing their credit affairs.

The Federal Reserve Board itself has offered no interpretation of §128(a)(9) or the identically worded §226.8 (b)(4). The Board staff's opinions on disclosure of acceleratation and attendant charges deserve no weight because of their procedural and substantive deficiencies. Procedurally, these opinions were not approved by the Board and were made without any comment from creditors or consumers. Substantively they are not only internally inconsistent and confusing, but are contrary to the basic goal of the Act and Regulation of meaningful disclosure of important credit terms.

Argument

I. By Concealing a Critical Credit Term, Ford Motor Credit Company's Failure To Disclose All Charges Payable Upon Acceleration for Late Payment Violates the Truth in Lending Act's Most Basic Policy of Informing Consumers of the True Costs of Purchasing Credit.

As this Court has recognized in *Mourning* v. *Family Publications Service*, 411 U.S. 356, 363-64 (1973), Congress passed the Truth in Lending Act in 1968 in part to require meaningful disclosure of credit terms so that consumers

could make informed choices when purchasing credit. The acceleration clause is a critical term because the consequences to the consumer of its exercise are devastating. The major consequence of demanding payment of the unpaid balance is the immediate, unanticipated economic burden on the consumer. The typical consumer enters into a credit transaction expecting to, and able to, pay the full debt only by making the installment payments agreed upon over a stated period of time. But upon acceleration for untimely payment due to illness, unemployment and other crises beyond the consumer's control,[2] that expectation is suddenly thwarted; the consumer must pay not only the monthly installment but immediately all the remaining unpaid monthly installments. This unanticipated economic burden increases dramatically the likelihood of default judgment[3] and garnishment of wages. These lead in turn to even more drastic and far-reaching results—loss of job security, increased reliance on welfare assistance and new employment obstacles.[4] The consumer's inability to pay an accelerated debt results in a loss of credit standing. This loss of credit is especially harmful since two-thirds of all major durables acquired by middle and low-income consumers are purchased with credit[5] and seventy-five percent of low-income consumers use credit for at least some of their major purchases.[6]

The significant increase in a consumer's immediate out-

[2] National Commission on Consumer Finance, Consumer Credit in the United States 43 (1972).

[3] D. Caplovitz, *The Poor Pay More* 161 (1967).

[4] The unfortunate results of wage garnishment and other creditor practices are documented in D. Caplovitz, *Consumers In Trouble* 271-289 (1974). Title II of the Consumer Credit Protection Act, "Restriction on Garnishment," was promulgated largely as a partial response to these facts. 15 U.S.C. § 1671 *et seq.*

[5] Note, *Consumer Legislation and the Poor*, 76 Yale L.J. 745, 761 (1967).

[6] D. Caplovitz, *The Poor Pay More* 100-101 (1967).

standing debt obligation caused by acceleration contributes also to the pressure to declare bankruptcy.[7] Bankruptcies in turn create a significant risk of loss to other creditors.

Because the consequences of acceleration are so serious, the risk should be taken consciously and not come as an unwelcome surprise as it did with Donna Eaton and Mr. and Mrs. Milhollin. Neither at the time the contracts were signed nor at any other time did FMCC disclose its right, upon acceleration for late payment, to impose upon Mr. and Mrs. Milhollin and Donna Eaton the immediate payment of the full unpaid balance, including unearned interest, and including a $15 charge. Instead, its alleged right to impose a $15 acquisition fee is nowhere set out, and the remaining right to demand immediate payment of the full unpaid balance was printed in minute print on the back of the contract. Only the inconsequential right to impose the charge of the lesser of $5 or 5% of the unpaid monthly installment was disclosed on the front of the contract.

Disclosure of all charges payable in the event of late payment and acceleration would further the fundamental Truth in Lending goal of the informed use of credit. Consumers will use the information when shopping for credit. The disclosure of an acceleration clause also enhances the informed use of credit after a credit agreement is signed. An accurate statement of the consequences of a late payment increases a consumer's opportunity to manage, plan and understand his credit affairs. This ability to avoid the consequences of uninformed use of credit is likely to benefit consumer and creditor alike, especially in times of financial strain.

Acceleration clauses are far from universal. The Report of the National Commission on Consumer Finance

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[7] D. Caplovitz, 2 *Debtors In Default* 14-3 (1971). "[T]he greater the indebtedness of the debtor, as measured by the ratio of his monthly installment payments to his monthly income, the greater his likelihood of going bankrupt."

found that only 47% of the retailers used acceleration clauses in their installment credit contracts and 68% in their open-end credit contracts. Even finance companies, of which FMCC is one, are not unanimous in the use of acceleration clauses; 5% of all finance companies do not use acceleration clauses in indirect automobile loans, 10% do not use them for personal loans, and 7% do not use them for indirect loans for other consumer goods.[8] Disclosure of the critical acceleration clause will produce consumer awareness, just as disclosure of the Annual Percentage Rate resulted in a substantial increase in consumer awareness of Annual Percentage Rates.[9] While not every consumer will shop to avoid this onerous credit term, awareness of the term's significance by only 10% of the relevant population is considered sufficient to produce an informed marketplace and competition between creditors over that term.[10]

FMCC and its amici curiae, particularly Consumer Bankers Association, complain that acceleration is an insignificant technical term which, like all technical terms,

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[8] D. Greer, *Creditors Remedies and Contract Provisions* 31-35 (National Commission on Consumer Finance, Technical Studies Vol. V 1973). The percentages may reflect a margin of error due to a small survey non-response rate. *Id.* at 37.

[9] National Commission on Consumer Finance, Consumer Credit in the United States 176 (1972).

[10] *Id.* The NCCF Report acknowledges the effect on the market of those persons who will be reached by Truth in Lending:

> In terms of fostering viable rate competition among credit grantors, these levels of awareness produced by [Truth in Lending] are probably adequate. Not all consumers need be aware of the [Annual Percentage Rate] or shop for credit to bring about effective price competition. A significant marginal group of consumers who are aware and do shop is sufficient to "police" the market. As Senator Douglas pointed out in the House hearings on H.R. 11601:
>
> > . . . it is the undecided minority that influences the sellers. So you need only have, in my judgment, about 10 percent cost conscious and they will get the firms competing for that 10 percent.

should not be disclosed. Litigation over disclosure of technical terms, they claim, has substantially increased the federal court caseload and the cost of creditor compliance with the Truth in Lending Act. Consumer Bankers Association Brief at 19. That claim is simply not true. Truth in Lending cases represent little more than one percent of all cases filed between 1972 and 1978[11] or less than 5 cases per federal district judge per year. Nor is their claim relevant. *Reiter* v. *Sonotone Corp.*, 47 U.S.L.W. 4672, 4675 (June 11, 1979). Moreover, what litigation exists is a reflection of the sizeable amount of creditor non-compliance, even ten years after the enactment of the Act.[12] One example of this creditor non-compliance is FMCC's decision to litigate this issue, rather than disclose acceleration.

This litigation could have been avoided, if FMCC had

[11] The following table shows the number of consumer protection cases filed compared with the total number of cases filed for the period 1972-1978:

	Total Cases Filed	*Consumer Credit Cases Filed*	*% Consumer/ Total*
1972	96,173	415	0.43%
1973	98,560	743	0.75%
1974	103,530	1,682	1.62%
1975	117,320	2,237	1.91%
1976	130,597	2,147	1.64%
1977	130,567	2,183	1.67%
1978	138,770	1,957	1.41%
Totals	815,517	11,364	1.39%

The Annual Report of the Director of the Administrative Office of the United States Courts, 191, 220-221 (1975) and the Annual Report of the Director of the Administrative Office of the United States Courts, 177, 210, 211 (1978).

Included in the Truth in Lending statistics are all Consumer Credit Protection Act cases, including Equal Credit Opportunity, Fair Credit Reporting, Fair Credit Billing, and Collection Practices, as well as odometer fraud cases filed under the Motor Vehicle Information and Cost Savings Act and cases filed under the Interstate Land Sales Full Disclosure Act.

[12] Board of Governors of the Federal Reserve System, Truth in Lending Annual Report to Congress 11 (1978).

disclosed a simple explanation of its right of acceleration and the method of rebating unearned interest. A disclosure such as the following would inform consumers of the effect of acceleration:

> If you (the buyer) pay any installment late or otherwise break this agreement, I (the seller) can demand the immediate payment of the entire amount of money you still owe me under this contract. You will receive a credit for unearned FINANCE CHARGES, computed by the sum of the digits method after first deducting $15.00.

It is curious that FMCC did not attempt to make any simple disclosure, especially since the only law at the time of the making of the contracts was clear; the court in *Garza* v. *Chicago Health Clubs, Inc.*, 347 F.Supp. 955 (N.D. Ill. 1972) required disclosure of the acceleration clause fully two years prior to the date of the contracts in this case. Other creditors chose to disclose the right and consequences of acceleration. See Appendix A. FMCC could have done the same.

II. Ford Motor Credit Company Violated the Truth in Lending Act §128(a)(9) and Regulation Z §226.8 (b)(4) by Failing To Disclose All Charges Payable in the Event of Late Payment.

The Truth in Lending Act §128(a)(9) requires the disclosure of "default, delinquency or similar charges payable in the event of late payment" in closed-end credit transactions. Regulation Z §226.8(b)(4) repeats this language verbatim. FMCC violated these provisions by failing to disclose three important charges which it imposed upon late payment. First, it failed to disclose that the entire unpaid balance is payable if FMCC accelerates because of late payment. Second, it failed to disclose its

contractual right to retain unearned interest as a default charge, a right exercised in the Milhollins' case in the amount of a $28.01 charge. Third, FMCC failed to disclose its imposition of a $15 acquisition fee as a charge for late payment. These charges were imposed on the Milhollins and Eaton by FMCC without any advance warning and solely because they defaulted on their obligations by failing to make timely payment. Disclosure of these charges is mandated by the plain language of the Act and Regulation Z.

A. *Requiring Immediate Payment of the Full Unpaid Balance Upon Acceleration for Late Payment Is a Default or Similar Charge Payable in the Event of Late Payment.*

1. *The Plain Meaning of "Default Charge" Includes the Accelerated Unpaid Balance Due Upon Default.*

"Default charge," "delinquency charge" and "similar charge" are nowhere defined in the Truth in Lending Act or Regulation Z. In the absence of any such definition, rules of statutory construction provide that words should be given their ordinary, common meaning. 2A Sutherland, *Statutory Construction* §47.27 (1973, Supp. 1979). The ordinary meaning of "charge" is "pecuniary liability," Webster's *Third New International Dictionary* 377 (Unabridged 1971), and thus the ordinary meaning of a "default charge" is a pecuniary liability assessed upon or due to default.

This definition of default charge is sensible, simple and clear. More importantly, it is fully consistent with Truth in Lending's basic policy that the consumer be given all significant credit information so that he can compare more readily the options offered him by creditors and know with a certainty his total obligations. Thus, §128(a)(9) of the

Act and §226.8(b)(4) of the Regulation require FMCC to disclose the pecuniary liabilities it assesses upon default, including immediate payment of the unpaid balance, not merely to disclose the inconsequential penalty of $5 or 5% of the unpaid monthly installment.

FMCC attempts to circumvent this plain and clear meaning of the statute and regulation by arguing that the term "default charge" in §128(a)(9) of the Truth in Lending Act should not be given its ordinary meaning, but rather a meaning allegedly unique to the consumer credit industry. Petitioners' Brief at 34. In the consumer credit industry, according to FMCC, "default charges" describe only the compensation a creditor receives on a precomputed contract for the debtor's delay in making timely installment payments, Petitioner's Brief at 34-35, that is, the type of charge described in Paragraph 12 of FMCC's contract, the lesser of $5 or 5% of the unpaid monthly installment.

FMCC's authority for the allegedly technical meaning of "default charge" is weak and inconclusive. The pages in Curran, *Trends in Consumer Credit Legislation* 1965) cited by FMCC, Petitioners' Brief at 36, do not even use the words "default charges" and define compensation for the consumer's delay as a "delinquency charge." FMCC also misquotes Consumer Credit Guide in the same fashion. *Compare* Petitioner's Brief at 34-35 *with* Consumer Credit Guide ¶4230.

Moreover, *Corning Glass Works* v. *Brennan,* 417 U.S. 188 (1974), upon which FMCC relies heavily, makes clear that statutory terms must be interpreted in accordance with their ordinary meaning unless there is specific evidence both that the term actually is used differently by the industry and that Congress intended to adopt such different usage. FMCC offers no such evidence on legislative history and indeed, there is none.

Ironically, FMCC's proffered definition of "default charge" is itself contrary to the usage in the industry, and renders superfluous the Act's use of the words "default charge." FMCC's suggested definition of "default charge"—compensation for the consumer's delay in making timely payment—is the classic definition of "delinquency charges," not default charges, 1 Cons. Cred. Guide, ¶4230. To define "default charges" as "delinquency charges" makes "default charge" redundant, violating the rule of statutory construction that courts are to construe words so as to give meaning to each. 2A Sutherland, *Statutory Construction* §46.06. If Congress had intended "default charge" as FMCC argues, it simply would have omitted the term entirely from the Act. The Federal Reserve Board staff recognized this in construing "default charges" broadly to include any charge which is due by virtue of default, including attorneys' fees and foreclosure costs. Federal Reserve Board Official Staff Interpretation FC-0054 [1974-1977 Transfer Binder] Cons. Cred. Guide (CCH) ¶31,552 (April 4, 1977).

In arguing that "default charge" ought to be given a narrow interpretation, FMCC and its *amici* are forced to rely solely on the revision of §128(a)(9) of the Act which in its draft form required disclosure of the "terms applicable in the event of advanced or delayed payment . . . ," S. 5, 90th Cong., 1st Sess. §4(a), 113 Cong. Rec. 14691 (1967). FMCC argues that the change from "terms" to "default, delinquency, and similar charges" indicates an intent to give "default charges" a narrow meaning. However, in commenting on this revision, the Senate Committee Report noted that "[The final] language is similar to the original S. 5 except that the requirement to indicate the terms applicable in the event of advanced payment is deleted." S. Rep. No. 392, 90th Cong., 1st Sess. 15 (1967). If anything is to be read from this change in language it is a congressional intent to maintain a broad definition of "default charges," not a narrow meaning as FMCC suggests.

Moreover, this Court previously has found a specific remedial congressional intent enunciated in the Truth in Lending Act which militates against restrictive interpretation of its terms. *Mourning* v. *Family Publications Services,* 411 U.S. 356, 364 (1973). Because of the remedial nature of the statute, rather than construing it in narrow and technical terms, a court is "guided by the familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes." *Tcherepnin* v. *Knight,* 389 U.S. 332, 336 (1967); *Abbott Laboratories* v. *Portland Retail Druggists Association, Inc.,* 425 U.S. 1, 12 (1976); *SEC* v. *Capital Gains Research Bureau,* 375 U.S. 180, 195 (1963). Thus, "default charges" should not be given a narrow meaning which contradicts its sense in ordinary English.

2. *Nothing in the Act, Legislative History, or Regulation Z in any Way Suggests that "Default Charge" in § 128(a)(9) and §226.8(b)(4) Means Only "Extra Charges" Beyond the Total of Payments.*

The Truth in Lending Act and Regulation Z are based on a scheme of disclosure of the significant indices of purchasing credit. They require disclosure of not only the total amount of money the consumer must pay, but also the timing of the payments. In that regard the Act and Regulation Z require disclosure of the scheduling of repayment, including due dates, the periodic payment amounts, downpayments, balloon payments, and pick-up payments. Regulation Z §226.8(b)(3); Federal Reserve Board Interpretation §226.504.

Nonetheless, FMCC would have this Court interpret "default charges" under the Act, §128(a)(9) and Regulation Z §226.8(b)(4) as applying narrowly to only "extra

charges," that is, charges in excess of the total amount due under the scheduled periodic installments. According to FMCC, since the unpaid balance is the total amount due, it is not an "extra charge" assessed for default and therefore need not be disclosed. By this claim, FMCC fundamentally misconstrues the Act and Regulation Z by urging that only the total amount the consumer must pay, and not the timing of that payment, must be disclosed.

Moreover, FMCC cites no authority for this novel argument, and indeed the legislative history provides no support whatsoever. None of the Committee Reports states or in any way implies that "charges payable in the event of late payments" are limited to sums in excess of the amount ordinarily due. H.R. Rep. No. 1040, 90 Cong., 1st Sess. (1957); S. Rep. 392, 90th Cong., 1st Sess. (1967); Conference Rep. No. 1397, 90th Cong., 2d Sess. (1968).

Indeed, FMCC's argument reduces itself to absurdity quickly. Under FMCC's proffered interpretation, even the unearned finance charge is not a charge under Sec. 128 (a)(9) of the Act and Sec. 226.8(b)(4) of Regulation Z, as it clearly is an amount due under the original term of the contract. Yet the authorities are virtually unanimous that unearned interest is a "default" charge.[13]

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[13] *McDaniel* v. *Fulton National Bank,* 571 F.2d 948, *aff'd on rehearing,* 576 F.2d 1156 (5th Cir. 1978); *Griffith* v. *Superior Ford,* 577 F.2d 455 (8th Cir. 1978); *Johnson* v. *McCracken-Sturman Ford, Inc.,* 527 F.2d 257 (3rd Cir. 1975); *Tarplain* v. *Baker Ford, Inc.,* 466 F.Supp. 1340 (D.R.I. 1979); *Price* v. *Franklin Investment Co.,* 574 F.2d 594 (D.C. Cir. 1978); *see Glover* v. *Doe Valley Development Corp.,* 408 F.Supp. 699 (W.D. Ky. 1975); *Franklin* v. *First Money, Inc.,* 414 F.Supp. 21 (E.D. La. 1976); *Paer* v. *Aetna Finance Company,* 5 Consumer Credit Guide (CCH) ¶ 98,353 (N.D. Ga. 1976). Of the Circuit Courts to address this issue, only the Tenth Circuit, in *Begay* v. *Ziems Motor Co.,* 550 F.2d 1244, 1248 (10th Cir. 1979) suggests that unearned interest is not a charge, finding support for its view in the failure of the Federal Reserve Board staff to issue any official regulation on the subject. However, after the decision in *Begay,* the Federal Reserve Board staff issued Official Staff Interpretation FC-0054 (April 4, 1977) [1974-1977 Transfer Binder] Cons. Cred. Guide (CCH) ¶ 31,552, 42 Fed. Reg. 18056 (1977). FC-0054 describes the retention of unearned interest as a charge.

3. *FMCC's Own Contractual Language Defines the Accelerated Unpaid Balance as a Default Charge Payable in the Event of Late Payment.*

FMCC next argues that even if the unpaid balance is a default charge, nevertheless it is not "payable in the event of late payments" and thus need not be disclosed under the Act §128(a)(9) and Regulation Z §226.8(b)(4). But the very language in the FMCC contracts compels the opposite conclusion, that the unpaid balance *is* payable in the event of late payment. Paragraph 19 of FMCC's contracts grants FMCC the right to accelerate the unpaid balance in the event of "default."[14] And "default" is used in Paragraph 12 of FMCC's contracts to mean late payments.[15]

In fact, FMCC utilized Paragraph 12 to impose a charge of 5% of the monthly installment when the Milhollins were in default by paying late. A. 18. FMCC had authority pursuant to its own contractual language to impose that charge only if "default" in Paragraph 12 includes "late payments." Since FMCC actually interpreted "default" in Paragraph 12 of its own contract in this fashion, "default" in Paragraph 19 of the contract must also encompass "late payments."

FMCC also appears to argue that acceleration is available and the demand for the unpaid balance can be made only upon a total failure to make any payment. Petitioners' Brief at 35. FMCC argues that when a payment is

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[14] Paragraph 19 reads in relevant part:

> In the event Buyer defaults in any payment . . . Seller shall have the right to declare all amounts due or to become due hereunder to be immediately due and payable . . . . A. 10, 66.

[15] Paragraph 12 states:

> Delinquency Charges. Buyer hereby agrees to pay a delinquency charge on each installment in default for more than 10 days in the amount of 5% thereof or $5, whichever is less, plus such expenses incurred by the Seller in effecting collection hereunder as may be allowed by law. A. 9, 65.

actually made, even though late, FMCC does not have grounds for acceleration. Not only is this construction entirely inconsistent with FMCC's own use of "default" in both Paragraph 12 and Paragraph 19 of its contracts, but FMCC stretches credulity to suggest that it drafted its contracts to intentionally deprive itself of the right to accelerate the maturity where a debtor too often pays an installment twenty to thirty days or more after the due date.

This construction of acceleration clauses that FMCC urges upon the Court is inconsistent with the standard construction that the creditor has the right to accelerate for any default, that is "breach of some condition of the contract by the debtor." Black's *Law Dictionary* 26 (4th Ed. 1968). Since the Milhollins' contract requires payment of a specific sum on the 29th of each month, and Eaton's contract on the ninth of each month, and both specify that "Time is of the essence," A. 10, 66, failure to pay on that date gives FMCC ground to declare the consumer in default and accelerate. In fact, the National Commission on Consumer Finance recommended that "default" should be left for definition by the parties but "should result only from the breach of major contract provisions, such as failure to make timely payments of interest or principal . . . ." NCCF, *Consumer Credit in the United States* 25 (1972). Similarly, the Federal Trade Commission staff considered the broad definition of default as including untimely payment to be so prevalent by creditors that it urged its prohibition. That staff noted:

> Abuses associated with acceleration follow from the broad definition of default which triggers the acceleration right. *Default may be considered to have occurred* [*and thus be permissible*] *if the debtor is one day late making an installment.* . . . FTC Staff Report, *Trade Regulation Rule: Creditor Remedies* 600 (1974). (emphasis supplied)

The Uniform Commercial Code, including Oregon's version which governs the Milhollin and Eaton contracts, permits any ground for default and acceleration upon default as long as the creditor in good faith believes that the prospect of payment is impaired. UCC §1-208 and Official Comments.

Furthermore, as discussed more fully in Section IIA 4 of this Brief, the contracts in the legislative records of the Act do not limit the use of acceleration to non-payment of the installment. They allow the creditor to accelerate when the installment is late.

4. *The Actual Credit Contracts Before Congress During Consideration of the Act Defined "Default Charge" To Include Acceleration of the Unpaid Balance in the Event of Late Payment.*

FMCC argues that Regulation Z §226.8(b)(4) does not require the disclosure of the unpaid balance owing upon acceleration because if Congress had intended to require the disclosure of acceleration it would have said so explicitly. This argument begs the real question. The term "default charge" *did* describe the balance owing upon acceleration, as that term was used in the contracts presented during legislative testimony on the Truth in Lending Act. Many contracts in the legislative record of the Truth in Lending Act made acceleration an event of late payment,[16] other contracts made acceleration a consequence

[16] Of the twenty-four legible, complete and nonduplicative contracts in the legislative record of the Act, eleven permit acceleration for late payment. They are found at: Subcomm. of the Senate Banking and Currency Comm., Hearings on S. 2755, 86th Cong., 2d Sess. (1960) at 264, 266, 778; Subcomm. of the Senate Banking and Currency Comm., Hearings on S. 1740, 87th Cong., 2d Sess. (1962) at 27, 297; Subcomm. of the Senate Banking and Currency Comm., Hearings on S. 750, 88th Cong., 1st and 2d Sess. (1963-1964) at 169, 170-171, 173-174, 212-213, 497, 1153.

of default.[17] Few contracts provided for the payment of a delinquency charge.[18] Thus, the right to accelerate and charge the consumer with immediate payment of the unpaid balance upon untimely payment was more widely retained by the creditors whose contracts were put into the record than was the right to impose a delinquency charge. Indeed, because of its frequent appearance in the contracts, prevalent use and devastating effect on consumers, this Court justifiably may assume that Congress intended its disclosure absent strong evidence to the contrary.

Moreover, it would be odd if Congress were to view the right to impose a small compensatory sum as sufficiently important to require its disclosure and yet not view the right to impose a much larger amount of money, the accelerated unpaid balance, as not requiring disclosure.

[17] Of the twenty-four contracts, twelve permit acceleration upon default. They are: Subcomm. of the Senate Banking and Currency Comm., Hearings on S. 2755, 86th Cong., 2d Sess. (1960) at 264, 265, 267, 268; Subcomm. of the Senate Banking and Currency Comm., Hearings on S. 1740, 87th Cong., 2d Sess. (1962), at 279; Subcomm. of the Senate Banking and Currency Comm., Hearings on S. 750, 88th Cong., 1st and 2d Sess. (1963-1964) at 43, 81-82, 271, 457, 1163, and 1175; Subcomm. of Financial Institutions, Senate Comm. on Banking and Currency, Hearings on S. 5, 90th Cong., 1st Sess. (1967) at 319. One contract does not permit acceleration for any reason, Subcomm. of the Senate Banking and Currency Comm., Hearings on S. 2755, 86th Cong., 2d Sess. (1960) at 208.

[18] Of the twenty-four contracts, only seven provide for delinquency charges. They are: Subcomm. of the Senate Banking and Currency Comm., Hearings on S. 2755, 86th Cong., 2d Sess. (1960), at 266, 267, 779; Subcomm. of the Senate Banking and Currency Comm., Hearings on S. 750, 88th Cong., 1st and 2d Sess. (1963-64) at 168, 169, 170-171, 173; Subcomm. on Financial Institutions, Senate Comm. on Banking and Currency, Hearings on S. 5, 90th Cong., 1st Sess. (1967) at 319.

B. *Ford Motor Credit Company's Claim to, and Actual Retention Upon Default and Acceleration of, Interest in Excess of That Retained for Early Payment Constitutes a Charge Which Was Not Disclosed in Violation of §128(a)(9) of the Act and §226.8(b)(4) of Regulation Z.*

FMCC's contracts granted it the right to assess against the Milhollins' account a charge of unearned finance charges upon default occasioned by untimely payment. This right was not disclosed to them. Indeed, FMCC exercised this right by retaining from the Milhollins, upon their untimely payment and FMCC's declaration of default and acceleration of their indebtedness, unearned finance charges of $28.01 in excess of what it would retain for early payment.[19] It asserted and exercised this contractual right notwithstanding its alleged unwritten "policy" to the contrary and notwithstanding any state law allegedly prohibiting the retention of unearned interest.

[19] FMCC claimed $2,415.92, as the unpaid principal balance and late charges, A. 18, but according to our calculations, was entitled to only $2,387.91, an overcharge of $28.01. We obtained this $2,387.91 by first determining how much the Milhollins owed FMCC on February 21, 1975, the date of repossession, A. 21, and the date FMCC demanded payment of an accelerated amount. That amount is $3,015.17. That figure of $3,015.17 is obtained by adding to the original total of payments of $3,084.64, A. 9, the amount of $263.52, as the premium for casualty insurance added to the debt by FMCC on October 4, 1974, Mil. R. 92, 95, and then subtracting the $342.72 in actual payments made by the Milhollins, A. 19, then adding late charges of $9.73. A. 18. We then calculated the rebate of $627.26 and subtracted the rebate from $3,015.17 to obtain $2,387.91.

According to our calculations, FMCC should have rebated $627.26 in unearned charges. The calculation method we used is the same as that set out in Paragraph 14 of the contract: deduct $15 from the Finance Charge, then calculate the rebate according to the sum of the digits method. Since the charges totaled $975.36 and $15 subtracted from that is $960.36, the Milhollins were entitled to a rebate of unearned charges of $960.36 times 29x30/36x37 or $627.26.

1. *FMCC's Retention of Unearned Finance Charges Constitutes a Charge.*

The $28.01 of unearned interest retained by FMCC is a charge within the meaning of Regulation Z §226.8(b)(4). It is a pecuniary liability. It is unearned interest payable only because of the Milhollins' untimely payment and FMCC's declaration of default and acceleration. If the Milhollins had voluntarily prepaid on the date FMCC accelerated the maturity of the contract, they would have had to pay $28.01 less than the $2,440.42 FMCC demanded of them.

The majority of Courts which have considered the question view the creditor's retention of unearned interest as a charge.[20] The Fifth Circuit, in *McDaniel* v. *Fulton National Bank,* 571 F.2d 948, 950, *aff'd on rehearing,* 576 F.2d 1156 (1978), held:

> [W]here the acceleration has the effect to require payment of interest not earned as of the accelerated due date, an additional charge has been imposed . . . . We find ourselves unable to classify this extra . . . payment consequent upon acceleration as anything other than a "default, delinquency or similar charge payable in the event of late payment" which is required to be disclosed. (footnote omitted)

2. *FMCC's Contractually Asserted Right To Retain Unearned Interest Must Be Disclosed.*

Regardless of whether FMCC actually retained unearned interest, the contractual right it arrogated to itself must be disclosed.

[20] See n. 13, *supra.*

FMCC's contractual right to unearned interest upon acceleration is found in each contract's acceleration clause, which provides in relevant part:

> In the event Buyer defaults in any payment . . . Seller shall have the right to declare all amounts due or to become due hereunder to be immediately due and payable. . . . A. 9, 65.

Under this clause, FMCC has the right not only to the periodic amounts due, but also to all the amounts to become due, comprising unearned interest as well as principal. E.g., *Beneficial Finance Company* v. *Treff,* 134 Ga. App. 17, 213 S.E.2d 126 (1975) ("the entire amount due hereon" upon default and acceleration includes all interest).

Indeed, FMCC does not deny this construction of "amounts due or to become due," but instead suggests that this Paragraph 19 acceleration clause language is somehow modified by Paragraph 14, Petitioners' Brief at 6, a paragraph applying by its very terms only to rebates upon voluntary prepayment.

As discussed, *infra* at pp. 34, 35, voluntary prepayment and acceleration are separate and distinct events, as FMCC readily admits. Petitioners' Brief at 52. If FMCC had intended to limit the amount due upon acceleration by crediting unearned finance charges, it could have stated so simply in Paragraph 19.

FMCC also implicitly argues that, regardless of what the contract actually provides, the express contractual term is modified by state law that allegedly mandates a rebate of unearned finance charges. However, FMCC assumes erroneously and without benefit of any discussion both that Oregon law requires the rebate of unearned finance charges upon acceleration and that express terms

of contracts automatically are superseded by contrary state law.

Oregon law does not prohibit the retention of unearned finance charges upon acceleration. The contracts in question, retail installment contracts for the purchase of motor vehicles, are regulated by OR. REV. STAT. § 83.510 *et seq.* That statute does not prohibit the retention of unearned finance charges. The Oregon statute, OR. REV. STAT. § 83.620(1), 1977 Or. L., upon which FMCC relies, requires the rebate of unearned finance charges only upon voluntary payment "in full at any time before maturity." It does not mandate a rebate for forced acceleration of the full unpaid balance upon failure to make timely payment. Nor does state common law make unenforceable the contractual claim to unearned finance charges.

Moreover, it is basic contract law that statutory law is not a part of the contract unless expressly referenced. 3 Corbin, *Contracts* § 551 (1960). Otherwise, no contract could ever be usurious or in any way illegal. Rather, law relevant to a particular contract is consulted to determine the legality of a contract provision or to construe ambiguous terms; relevant law is referred to, not automatically incorporated to modify express contractual terms. *Id.*

FMCC's position is also inconsistent with the Truth in Lending Act's policy of full disclosure. If the creditor need not disclose state law restrictions on its rights, borrowers must become experts in their state statutes and common law to know the true, and "hidden," terms. Without this expertise consumers can neither comparison shop effectively nor assert their rights after the contracts are made. As the United States points out in its *amicus* brief at 24, FMCC's position, "attributes to the borrower a knowledge of the state law, an assumption squarely at odds with the disclosure policies underlying the Act." Thus, this position totally ignores this Court's clear admonition, "Let the

seller disclose." *Mourning* v. *Family Publications Service*, 411 U.S. 356, 377 (1973).

3. *FMCC's Alleged "Policy" of Not Exercising Its Contract Right To Retain Unearned Interest Upon Default and Acceleration Is Irrelevant to Both the Fundamental Scheme and Express Language of Truth in Lending.*

FMCC's hidden "policy" of rebating all unearned finance charges upon acceleration exists at FMCC's unfettered discretion; it is a secret "policy." It was not disclosed to the Milhollins or Eaton and in fact was *never* disclosed until it became desirable to reveal such a "policy" in response to litigation. It is not binding because it is not a term of the contracts, and thus it can be changed at any time. In fact, it was changed by FMCC. *See* pp. 25, 26, *infra.* And this "policy" is not binding on any holder of the contract. It can be ignored by the original creditor, the car dealer; or by his assignee, FMCC; or by a subsequent assignee of FMCC.

Disclosure of only those contractual terms consistent with the creditor's policy is inherently antagonistic to the most fundamental policy of the Truth in Lending Act of full disclosure. The Act requires full and complete disclosure of certain terms, actual and conditional, not only so the consumer can shop but so the consumer at a later date can make informed financial decisions. If the policy is not disclosed, he lacks information to make an informed choice. Because a policy can be changed at any time, the consumer cannot get the benefit of his shopping.

There is no statutory or regulatory foundation for FMCC's contention that its private "policy," announced only after suit, may control its Truth in Lending disclosures. Nowhere in the Act or Regulation Z is there any

explicit or implied statement that contract terms need not be accurately disclosed if the creditor's actual policy is different from the contract terms. Nothing in the Act or in Regulation Z endorses the non-disclosure of a creditor's contractual rights just because the creditor may later waive them. Regulation Z especially requires a disclosure of rights that are often waived. *See* §226.8(a)(7) (in an open-end transaction, the creditor must disclose the "conditions under which a finance charge may be imposed" even though "the creditor may, at his option and without disclosure, refrain from imposing such finance charge."); §226.8(b)(5) (a creditor must disclose its security interest even if it waives its right to repossess the secured property); §226.8 (b)(7) (a creditor must disclose any prepayment penalty even though it may waive that penalty at a later date).

As the Fifth Circuit said *en banc* in *McDaniel* v. *Fulton National Bank,* 576 F.2d 1156, 1157 (1978):

> [T]he lenders urge . . . that even though a creditor possesses a contract right to accelerate payment and retain unearned finance charges, he need not disclose this right unless he in fact does so in the course of the collection process. We reject this interpretation out of hand as making disclosure requirements depend upon acts which may or may not take place in the collection process rather than on the creditor's rights acquired at the time the loan is made.
>
> What signifies is not what rights the creditor *exercises* in the event of default or how he exercises them but what rights he *possesses* under his contract with the debtor.

The United States also criticized FMCC's "creditor policy" approach:

> [Refusal] to require disclosure of a creditor's unwritten policies when they conflict with the contract [constitutes a failure] to provide the borrower with the information that is most useful in comparing the cost of credit. Brief for the United States as Amicus Curiae at 12.

The potential abuse inherent in conditioning disclosures on unstated, non-contractual credit "policy" is evident here. FMCC has had at least three separate unstated "policies" on rebating unearned interest upon acceleration. In 1972 FMCC's "policy" was to retain unearned interest. In *Block* v. *Ford Motor Credit Company,* 286 A.2d 128 (D.C. App. 1972), FMCC sued and attempted to obtain a judgment for unearned finance charges based upon contractual language virtually identical to that in Paragraph 19. In 1975, in the Milhollin case, FMCC claimed in an affidavit that it no longer retained unearned interest but rather rebated it as of the date of acceleration.[21] In 1977 in the Eaton case, FMCC claimed in a second affidavit that it rebated unearned interest, but now calculated the rebate not as of the date of acceleration, but the date of payment.[22] Thus, *Block* and the two affidavits

[21] L. B. Plummer, Manager of FMCC's Portland, Oregon branch, stated in his November 19, 1975 affidavit:

> "In the event Ford Motor Credit Company decides to accelerate the balance owed as a result of the default of the contract purchaser, it always computes the interest rebate *the same as* it would compute it *if the contract purchaser voluntarily prepaid* the contract, as set forth in Paragraph 14 of the face of the contract." (Emphasis supplied) A. 22.

[22] William F. Bellisasio, Manager of FMCC's Portland, Oregon branch, testified in the Eaton trial:

> "*Whenever Ford Credit is prepaid,* whether the prepayment is instigated by the customer or results from an acceleration by Ford Credit, the interest rebate is calculated and allowed in the exact same manner." (Emphasis supplied). A. 68.

reveal that FMCC has had at least three different "policies." At first it made no rebate. Then it rebated on the date of acceleration; finally, it calculated the rebate on the date of payment following acceleration. The policy it followed was the one in effect on the date of acceleration, not the date of the contracts; thus, the consumer could not know, on the date of the contract, what his full potential liabilities and obligations were.

Not only did FMCC's "policy" change, it appears that FMCC did not even follow its "policy." It claimed that the Milhollins owed FMCC $2,415.92 in principal and late charges. Under its "policy," the Milhollins would have owed FMCC only $2,387.91. The $2,415.92 represented more than an amount to which FMCC claimed its "policy" entitled it. FMCC's "policy" would allow FMCC to demand the unpaid balance minus a full rebate of unearned interest, or $2,387.91. FMCC failed to follow its "policy."

C. *FMCC's Right To Retain a $15 Acquisition Fee Is a Default Charge Payable in the Event of Late Payment That Must Be Disclosed.*

Even if one entirely accepts FMCC's definition of default charge as a monetary sum assessed as an extra charge because of late payment, FMCC has violated the Truth in Lending Act and Regulation Z by assessing a default charge which it failed to disclose. That charge is a $15 acquisition fee which FMCC undeniably retained upon acceleration.[23]

[23] *Griffifth* v. *Superior Ford,* 577 F.2d 455 (8th Cir. 1978). The Federal Reserve Board staff also views an "acquisition fee" as a "charge." In Federal Reserve Board Letter 472 (May 3, 1971) Consumer Credit Guide (CCH) ¶ 30,672, the Federal Reserve Board staff addresses the effect of a deduction of an acquisition charge prior to calculating the rebate of the unearned finance charge in the event of early payment. The staff referred to the early payment section, Regulation Z §226.8(b)(7) which requires the disclosure of two items: one, whether a rebate of unearned finance charges will be made and, if so, the method of calculating it; and two, the amount or method of calculating any charge that may be deducted from the rebate. It concluded that an acquisition fee, when it is deducted from the rebate of unearned interest, is a charge, and failure to disclose it violates Regulation Z. Under this logic, if this $15 fee is a charge to be disclosed under Regulation Z §226.8(b)(7) in the event of early payment, then when it is imposed upon late payment, it is a charge to be disclosed under Regulation Z §226.8(b)(4).

FMCC has argued throughout this case that its method of rebate of unearned finance charges upon acceleration is identical to its method of rebate upon prepayment. A. 21, 68. That method, set out in Paragraph 12 of the contract, is to deduct $15 from the finance charge before calculating the unearned interest to be returned to the consumer. This $15 is a default charge under FMCC's own definition. It is a monetary sum. It is an extra charge in excess of any interest earned under the scheduled periodic payments at the time a rebate is calculated. It is assessed because the consumer has failed to make timely payment and FMCC has declared him in default and accelerated the maturity of the contract.

An acquisition charge is a default charge as defined by the Circuit Courts as well. In *Johnson* v. *McCrackin-Sturman Ford, Inc.,* 527 F.2d 257, 266 (1975) the Third Circuit defined default charge as a "specific pecuniary sum assessed against the borrower solely because of his failure to make his payments in a timely manner."[24] Thus, regardless of whether "default charge" includes the accelerated unpaid balance, it necessarily includes this $15 acquisition fee, and this Court is warranted in finding a violation of Regulation Z §226.8(b)(4).

[24] The Federal Reserve Board staff also uses this definition of default charge, Official Staff Letter FC-0054, (April 4, 1977) [1974-1977 Transfer Binder] Cons. Cred. Guide (CCH) ¶ 31,552, 42 Fed. Reg. 18056 (1977).

III. This Court Should Not Defer to the Staff Letters and Official Staff Interpretation on the Subject of Acceleration.

A. *The Board Itself Has Not Spoken Concerning Acceleration, and Deference Is Not Due to the Staff's Opinions.*

The Board has not spoken, either by amendment or official interpretation, on the issue of acceleration, even though this question has been presented repeatedly through letters to the Board, petitions to the Board, and litigation. Rather, there exist only a staff interpretation and three opinion letters[25] which continue to confuse because of the Board's silence.

The sole staff interpretation involved here (Interpretation FC-0054) was issued before adoption by the Board of formal procedures which now provide the opportunity for outside views and comments. *See* Regulation Z, 12 C.F.R. §226.1(d) (amended Apr. 21, 1978). Public information letters are written in response to individual inquiries concerning Truth in Lending requirements, generally submitted by creditors. They represent the opinion of one employee of the agency on one specific factual circumstance and as such are not intended as statements of general applicability based on comprehensive analysis of Regulation Z and the purposes of the Truth in Lending Act. There is no established procedure for agency review of these letters, and no public comment is solicited. Yet this Court is being asked

[25] Federal Reserve Board Public Information Letter 851 (October 22, 1974) [1974-1977 Transfer Binder] Cons. Cred. Guide (CCH) ¶ 31,173; Federal Reserve Board Official Staff Interpretation FC-0054 (April 4, 1977 [1974-1977 Transfer Binder] Cons. Cred. Guide (CCH) ¶ 31,552, 42 Fed. Reg. 18056 (1977); Federal Reserve Board Public Information Letter 1208 (July 6, 1977) [1974-1977 Transfer Binder] Cons. Cred. Guide (CCH) ¶ 31,647; and Federal Reserve Board Public Information Letter 1324 (November 14, 1978) 5 Cons. Cred. Guide (CCH) ¶ 31,827.

to defer to statements which, because of their summary method of issuance and limited scope, have suffered greatly from lack of clarity and consistency.

The staff's vacillations are exemplified by even a cursory survey of the Truth in Lending interpretations and staff letters reported during the single month of August, 1979, in the Consumer Credit Guide. No less than six of these contain modifications, corrections, or rescission of past letters and interpretations. *See* Official Staff Interpretation FC-0163[26] (correcting consumer leasing disclosures published almost three years previously, at Fed. Reg. 45538); Official Staff Interpretation FC-0164[27] ("reconsidering" and "modifying" a public information letter and an official staff interpretation dealing with disclosure of multiple creditors); Letter 1337[28] ("modifying" a previous letter and three official staff interpretations which "incorrectly use" language concerning authorization for credit insurance purchases); Official Staff Interpretation FC-0166[29] ("rescinding" a letter concerning disclosure of required deposit balances); Letter 1344[30] ("modifying" a letter which took an "unnecessarily strict" position on changes of terms in open-end credit plans); and Letter 1340[31] ("rescinding' 'a letter on

[26] Federal Reserve Board Official Staff Interpretation FC-0163 (July 27, 1979) Cons. Cred. Guide (CCH) ¶ 31,842, 44 Fed. Reg. 37603 (1979).

[27] Federal Reserve Board Official Staff Interpretation FC-0164 (August 17, 1979) Cons. Cred. Guide (CCH) ¶ 31,843, 44 Fed. Reg. 41760 (1979).

[28] Federal Reserve Board Public Information Letter 1337 (March 26, 1979) Cons. Cred. Guide (CCH) ¶ 31,845.

[29] Federal Reserve Board Official Staff Interpretation FC-0166 (September 7, 1979) Cons. Cred. Guide (CCH) ¶ 31,856, 44 Fed. Reg. 46438 (1979). It also is worth noting that this interpretation itself now has been suspended by the Board, after a short published life span of one month (44 Fed. Reg. 54291-94).

[30] Federal Reserve Board Public Information Letter 1344 (June 1, 1979) Cons. Cred. Guide (CCH) ¶ 31,852.

[31] Federal Reserve Board Public Information Letter 1340 (April 30, 1979) Cons. Cred. Guide (CCH) ¶ 31,848.

multiple advance loans, on the ground that the previous letter had been "in error").

It should come as no surprise, then, that many courts have wisely refused to follow informal opinion letters written by Federal Reserve Board employees on Truth in Lending issues, recognizing that these letters should not be considered as authoritative as the actual agency regulation or formal interpretations. The court in *Pedro* v. *Pacific Plan,* 393 F.Supp. 315, 323 (N.D. Cal. 1975) correctly stated:

> Although such correspondences [opinion letters] are a 'valuable tool' in informing the public of the law's requirements, the opinions contained therein are not binding on this, or any other, court.

Other courts have similarly concluded that opinion letters written by a lone Board employee have little weight and have rejected certain letters. *See,* for instance, *Pollock* v. *General Finance Corp.,* 535 F.2d 295 (5th Cir. 1976), *aff'd on rehearing,* 552 F.2d 1142 (5th Cir. 1977), *cert. denied,* 434 U.S. 891 (1977); *Martin* v. *Commercial Securities Co.,* 539 F.2d 521 (5th Cir. 1976); and *Willis* v. *Town Finance Corp.,* 416 F.Supp. 10 (N.D.Ga. 1976). Even courts which have agreed with particular letters took great pains to note that the letters are not authoritative: *Bissette* v. *Colonial Mortgage Corp.,* 477 F.2d 1245 (D.C. Cir. 1973); *Bloomer* v. *McKnight Road Dodge, Inc.,* 397 F.Supp. 403 (W.D. Pa. 1975); *Philbeck* v. *Timmers Chevrolet, Inc.,* 499 F.2d 971 (5th Cir. 1974); *English* v. *MCC Financial Services, Inc.,* 403 F.Supp. 679 (M.D. Ga. 1975), *aff'd,* 520 F.2d 941 (5th Cir. 1975).

The only other Truth in Lending case to reach this Court, *Mourning* v. *Family Publications Service,* 411 U.S. 356 (1973), does not even remotely suggest that the courts are bound by informal opinion letters written by Board employees. *Mourning,* in upholding the authority of the

Board itself to promulgate the "Four Installment Rule" within Regulation Z, now at §226.2(S), held that it was not inconsistent with the purposes of the Act to include all transactions of more than four installment payments within the scope of credit transactions covered by the Act. Although recognizing the flexibility allowed to administrative agencies in general, and to the Board in particular, the Court emphasized that such flexibility was appropriate to regulate intentional evasion of the Act by creditors, which would undermine the basic operation of the Act:

> In delegating rulemaking authority to the Board, Congress emphasized the Board's authority to prevent such evasion. To hold that Congress did not intend the Board to take action against this type of manipulation would require us to believe that, despite this emphasis, Congress intended the obligations established by the Act to be open to evasion by subterfuges of which it was fully aware.

Certainly *Mourning* stands for the proposition that the Board itself has authority to promulgate regulations to further the purposes of the Truth in Lending Act. In this case, however, there is no such challenge to the authority of the Board to promulgate regulations. Further, there have been no official statements by the Board itself on acceleration, even though the Board certainly is aware of the confusion surrounding this issue. There only are a staff interpretation and three staff opinion letters, described by the Board as follows:

> (ii) Official staff interpretations will be issued upon those requests which in the opinion of the designated officials, require clarification of technical ambiguities in this Part or which have no significant policy implications.
>
> (iii) Unofficial staff interpretations will be issued where the protection of section 130(f) of the Act is

neither requested nor required, or where time strictures require a rapid response.[32]

Had the Board wished to issue a statement applicable to all situations, and not merely to the specific facts at hand, it could have and should have issued an official Board interpretation:

> . . . (i) Official Board interpretations will be issued upon those requests which involve potentially controversial issues of general applicability dealing with substantial ambiguities in this Part and which raise significant policy questions.[33]

The Board thus has not addressed the policy questions involved with the acceleration issue; instead, various Board employees have made a series of statements concerned with specific factual situations. The question at hand is not the authority of the Board to issue regulations, but whether deference is due to informal staff opinion letters. *Mourning* neither involved nor addressed this issue.

B. *The Staff Interpretation and Staff Opinion Letters Are So Illogical, Inconsistent and Confusing That They Provide No Guidance Whatsoever.*

1. *Where Inconsistency and Confusion Are Evident in Interpretations and Letters, This Court Should Not Defer to Them.*

This is not a case in which an agency has acted in accord with a well-established agency interpretation in effect without change for eighty years or more.[34] Rather,

[32] Regulation Z §226.1(d)(4)(ii) and (iii).

[33] Regulation Z §226.1(d)(4)(i).

[34] See, for instance, *Zenith Radio Corp.* v. *United States,* 437 U.S. 443 (1978), relied upon in Petitioner's Brief, p. 21.

this case involves four confusing and contradictory statements issued by the staff of the Federal Reserve Board over a three-year period, none of which embodies the official view of the agency itself. Under such circumstances, this Court should not defer to the opinion letters and staff interpretation.

This Court has enunciated the standard of consistency to be applied to regulations or interpretations by an agency; certainly no lesser standard should be applied to the informal letters and interpretations issued by the Board staff. *Skidmore* v. *Swift and Co.,* 323 U.S. 134, 140 (1944), held that courts should give weight to agency interpretations and opinions only *if* they showed consistency with earlier and later pronouncements on the same issue, and validity of reasoning as exhibited by thoroughness in considering the issue. Under the *Skidmore* standard, the letters and interpretation here would not be entitled to any deference even if they were official interpretations by the Board itself, due to their inconsistency, confusion, and unworkable nature.

Many other cases decided by this Court are in accord with the *Skidmore* standard. *See: Estate of Sanford* v. *Commissioner,* 308 U.S. 39 (1939) (an ambiguous Treasury Regulation has no persuasive force); *Alexander* v. *Cosden Pipe Line Co.,* 290 U.S. 484 (1934) (refusing to defer to the Commissioner of Internal Revenue's interpretation of a Revenue Act where the Commissioner had not issued uniform statements); *United States* v. *Calamaro,* 354 U.S. 351 (1957) (a Treasury Regulation found internally inconsistent has impaired persuasive force); *Espinoza* v. *Farah*

Mfg. Co., 414 U.S. 86 (1973) (no weight given to an EEOC regulation, partially because the Commission had once adopted a different definition of "national origin"); *Morton* v. *Ruiz*, 415 U.S. 199 (1974) (Bureau of Indian Affairs rules and regulations promulgated in an agency manual not deferred to where inconsistent with the agency's earlier pronouncements); and *Haggar Co.* v. *Helvering*, 308 U.S. 389 (1940) (Treasury Regulation rejected where interpretations of the statute had been inconsistent).

Lower court decisions under the Truth in Lending Act have rightly recognized that staff opinion letters or interpretations should not be deferred to if they are confusing or inconsistent. For example, the Fifth Circuit in *Pollock* v. *General Finance Corp., supra* at 1144-45, refused to follow two opinion letters concerning after-acquired property, because they "appear[ed] to conflict with" an earlier letter still in effect. *See also Brooks* v. *Stone Mountain Ford, Inc.*, Cons. Cred. Guide (CCH) ¶98,554 (N.D. Ga. 1975) (only "clear and unequivocal" opinion letters should be given weight by the courts).

2. *The Interpretation and Letters Show a Fundamental Misunderstanding of the Consumer's and Creditor's Views of Credit in Erroneously Equating Acceleration of Payments with Prepayment.*

Federal Reserve Board Public Information Letter 851, issued following the opinion in *Garzo* v. *Chicago Health Clubs, Inc.*, 347 F.Supp. 955 (N.D. Ill. 1972),[35] viewed acceleration of payments as "essentially a prepayment of the contract obligation." This assumption is relied upon in all of the subsequent releases.

[35] It is worth noting that the Eaton contract was signed on January 28, 1975, and the Milhollin contract in July, 1974. Therefore, FMCC could not possibly have relied on any of the letters or the interpretation in the Milhollin transaction, and only Letter 851 existed at the time of the Eaton contract. *Garza* thus was the chief authority on the acceleration issue when these contracts were consummated.

This equation of acceleration of payments with voluntary prepayment is totally erroneous from both the consumer's and creditor's perspective, as is evident from an elementary comparison of the processes involved. Indeed, FMCC admits as much. Petitioner's Brief at 52. (Acceleration is "both the legal and logical antithesis of prepayment.") Voluntary prepayment occurs at the option of the consumer, at a time when the payment of an amount far in excess of the regular monthly payment has become desirable. The consumer wishing to prepay an obligation has examined other financial obligations and has decided that such early payment would not endanger payment of those obligations. Acceleration, to the contrary, involves no such voluntary action by the consumer. It consists of a breach of contract terms by the consumer, followed by a unilateral demand by the creditor for a lump sum payment, a demand unexpected where no disclosure of the right to accelerate payments has been made. The consumer who has fallen behind on monthly payments rarely is capable of making a lump sum payment upon demand; indeed, the regular payment typically has been late precisely because of inability to pay even this smaller sum. Few creditors expect actual payment of the accelerated payment upon demand; rather, they anticipate the additional events of repossession and a deficiency judgment. To assume that a consumer would understand that the word "prepayment" includes this entire process of acceleration certainly is incorrect and contrary to the Truth in Lending Act's purpose of providing meaningful disclosure.[36]

[36] 15 U.S.C. §1601.

3. The Staff Opinion Letters and Interpretation Confusingly Mix the Disclosures Required Under Regulation Z §§226.8(b)(4), 226.8(b)(7), and 226.6(c).

By equating prepayment and acceleration of payments, the opinion letters and staff interpretation produce a contorted analysis of the acceleration process, as if it potentially involves both a prepayment of the obligation, which must be disclosed as such under Regulation Z §226.8(b)(7), and a default charge to be disclosed under Regulation Z §226.8(b)(4), if the creditor rebates less unearned finance charges following acceleration than it does following prepayment. Thus, acceleration constitutes "prepayment" where the creditor does not make additional charges to the consumer whose obligation has been accelerated, and so no additional disclosure is required beyond the prepayment disclosures of Regulation Z §226.8(b)(7). But, if sums are demanded beyond the amount due on prepayment, acceleration evidently loses some of its characterization as a "prepayment," and the excess amount demanded becomes a "charge" to be disclosed under Regulation Z §226.8(b)(4). By defining the acceleration of payments in this hybrid fashion, the letters and staff interpretation have one outstandingly consistent feature: they confuse the consumer and wrongly assume that he or she will instinctively discover these distinctions without even the benefit of disclosure of the right to accelerate payments.

In the most recent staff opinion letter on acceleration, Letter 1324, yet a third provision of Regulation Z is drawn into the debate. In Letter 1324, a creditor is permitted to claim a contractual right to unearned finance charges following acceleration, even though state law requires a rebate. However, such language may constitute misleading and confusing "additional information" within the meaning of Regulation Z §226.6(c). Whether a violation of this provision exists depends upon unspecified "circumstances of a particular case," according to the Letter. In addition to the problems facing consumers under this rather bizarre approach, Letter 1324 is equally unhelpful to the creditor who in good faith, is attempting to comply with the Truth in Lending Act's disclosure requirements. Apparently, even the creditor who discloses an acceleration clause in accord with the "test" of this Letter still may be considered in violation of Regulation Z. And ironically, after the Board has seemingly ignored virtually all of the numerous District and Circuit Court cases on acceleration for years, this Letter cautions creditors to "be aware of court holdings in their particular jurisdiction"—none of which precisely conform to the Letter's approach, or that of any of the other three releases. The creditor seeking guidance from the Board also has returned empty-handed.

4. The Letters and Interpretation Confuse the Date of Acceleration With the Date of Payment Following Acceleration.

According to Letter 851, disclosure of an acceleration clause would be required as a "charge" under Regulation Z §226.8(b)(4) only if, *"upon acceleration,"* the creditor retained unearned finance charges beyond those which would have been rebated under the disclosed provisions concerning rebate upon voluntary prepayment. The date of acceleration of payments is considered the key to measuring rebate, and to whether disclosure of the acceleration clause is required.

However, Interpretation FC-0054, while purporting to clarify the language of Letter 851, actually confuses that Letter. It states that a charge which must be disclosed under §226.8(b)(4) occurs if the creditor rebates less unearned finance charges than would have been rebated under

the disclosed prepayment rebate provisions, *"when the customer pays* the balance of the obligation upon acceleration" (emphasis added). No disclosure is required where the creditor rebates by the disclosed prepayment method, *"when the customer pays* . . . upon acceleration" (emphasis added). As revealed by the variety of state statutes regarding rebate in acceleration situations,[37] this is a significant and well-established difference. The date "when the customer pays" is rarely the exact date of acceleration, the date actually mentioned in Letter 851. Rather, the acceleration date is that on which the full amount of indebtedness is declared to be immediately due. Payment itself would follow various other events, such as repossession and resale, filing of suit, and deficiency judgment. The statutes of about half the states recognize these additional events as the keys to measuring rebate of unearned finance charges. For instance, rebate must be made as of the date of acceleration in Iowa;[38] as of the date that the creditor files suit in Louisiana;[39] and as of the date of judgment in Colorado.[40] Further, the statutes of the other half of the states appear to contain no rule concerning rebate after acceleration.

The staff of the Board thus is encouraging the kind of chaotic situation that all parties here are anxious to avoid: making disclosures under Truth in Lending dependent on an event which varies widely from state to state; and requiring a case-by-case examination of each transaction to determine the amount of unearned interest which would be retained under both acceleration and prepayment.[41]

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[37] See Appendix A of Respondent's Brief.
[38] Iowa Consumer Credit Code §2.510(6).
[39] Louisiana Consumer Credit Law §9.3529.
[40] UCCC §§2.210(8) and 3.210(8).
[41] In Letter 1324, the phrases "upon acceleration" and "upon payment following acceleration" are used interchangeably. *Amicus* confesses to an inability to rationally explain what disclosures would be required therein.

5. *The Staff Letters and Interpretation Are Contrary to Regulation Z and the Fundamental Policy of the Act in Linking Disclosure of Acceleration Clauses to a Creditor's Undisclosed "Policy."*

According to the two most recent staff opinion letters concerning acceleration, Letters 1208 and 1324, the fact that the contract gives the creditor a right to all unearned finance charges apparently is irrelevant to disclosure, where state law may require a rebate of some or all of this amount.

Letter 1208 addresses the common situation where the disclosure statement makes no reference to a right of acceleration, but the promissory note contains an acceleration clause under which the creditor claims the entire unpaid balance, with no mention of rebate of unearned finance charges in the event of payment after acceleration. According to the Letter, the key factor in determining whether disclosure should occur is "whether in fact the creditor does or does not rebate upon prepayment after acceleration in accordance with the rebate method shown on the disclosure statement." The individual creditor's policy thus is considered determinative of whether or not disclosure is required.

By looking to each creditor's rebate policy in a vacuum, this Letter fails to consider the detrimental effects of its approach on even a highly aware consumer. Not once in the Act or in Regulation Z is the disclosure of any required term linked to whether a creditor has a policy of exercising a claimed right. In fact, exactly the opposite approach is taken. For example, disclosure of the property serving as security for payment is required without qualification under 15 U.S.C. §§ 1638(a)(10) and 1639(a)(8) and Regulation Z §226.8(b)(5).[42] This disclosure must be made

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[42] Reg. Z §226.8(b)(5) requires disclosure of ". . . any security interest held or to be retained or required by the creditor."

even though it is common practice for creditors who take an interest in household goods to accelerate payments and seek a money judgment upon default, rather than seizing the secured property. The fact that the creditor has a policy against exercising its contractual right to claim secured property does not mean that disclosure of this right is not crucial to the consumer shopping for credit. The creditor still has the right to take this property, and could change its policy at any time. Similarly, Regulation Z §226.8(b)(6) mandates disclosure of "any penalty charge that *may* be imposed . . . for prepayment," in transactions not involving precomputed interest. Again, in an "open-end" credit transaction, a creditor must disclose "the conditions under which a finance charge may be imposed," even though "the creditor may, at his option and without disclosure, refrain from imposing such finance charge."[43] By introducing "creditor policy" as the key to whether or not disclosure of acceleration clauses is required, the letter is setting an extremely dangerous precedent to be applied to other disclosures as well. A creditor may change its policy any number of times between the consummation of a contract and the acceleration of an obligation. In fact, FMCC itself evidently changed its rebate policy between 1975 and 1977.[44]

Further, there is serious doubt whether any statutory or regulatory basis exists for the staff's assumption that a required disclosure is optional, depending on the particular circumstances of a transaction, such as "creditor policy." The one court that considered this issue concluded that the Board lacks this authority. In *Tarplain* v. *Baker Ford, Inc.*, 466 F.Supp. 1340, 1348-49 (D.R.I. 1979), *en route* to holding that unearned finance charges retained

[43] See 15 U.S.C. §1637(a)(1) and Reg. Z §226.7(a)(1).

[44] See notes 21 and 22, *supra*.

upon acceleration constitute a "charge" to be disclosed under 15 U.S.C. §1638(a)(9) and Regulation Z §226.8(b)(4), the court stated:

> Both Interpretation No. FC-0054 and Staff Opinion Letter 1208 recognize that retention of unearned interest is a "charge" within the meaning of 15 U.S.C. §1638(a)(9) and 12 C.F.R. §226.8(b)(4) which should be disclosed. There is no statutory basis, however, for then concluding that such a charge need only be disclosed in certain circumstances, i.e., when it is actually imposed and imposed in a manner different from that applied to voluntary prepayment. Nothing in the statute or Regulation Z indicates that any of the disclosure requirements are optional at any time; the statute simply states that a creditor "shall disclose . . . . (9) The default, delinquency, or similar charges payable in the event of late payments," 15 U.S.C. §1638(a), and Regulation Z is similarly unequivocal. Such mandatory language requires disclosure of charges imposed upon late payments without reference to whether or not they are collected.

The final staff opinion on acceleration, Letter 1324, addresses the common situation where the disclosure statement does not mention acceleration, and the contract gives the creditor the right to retain unearned finance charges following acceleration even though state law requires a rebate. For the first time, the staff considers state statutes which govern the rebate of unearned finance charges following acceleration. Letter 1324 meticulously avoids the propriety of claiming a contractual interest in violation of state law. Instead, it states that, even though the creditor may claim a contractual right, following acceleration, to

unearned interest beyond the amount it could retain upon voluntary prepayment, there is no "charge" under Regulation Z §226.8(b)(4) if state law requires a rebate as great as that made upon prepayment. Thus, a creditor is permitted to claim unearned finance charges beyond those permitted under state law, and the letter further seems to assume that the undisclosed "creditor policy" concerning rebate will always conform to state law.

Again, consumers are left in the dark, unable to comparison shop for credit without detailed knowledge of state law, a result certainly contrary to the essence of the Truth in Lending Act: meaningful disclosure to consumers of important credit terms.

C. *The Court, Not the Administrative Agency, Has Primary Expertise on the Purely Legal Question of Whether the Act Requires Disclosure of Acceleration Clauses.*

The question of whether disclosure of the creditor's right to impose immediate payment of the full unpaid balance upon default and acceleration is required by the Truth in Lending Act is a purely legal question of interpretation of statutory language and determination of congressional intent. It does not involve any agency expertise in applying unique or particular facts to enforce general statutory language. It does not require complex economic analysis. It does not even involve interpretations of the agency's own language in its regulations. Indeed, the regulatory provision merely repeats verbatim the statutory language found in 15 U.S.C. §§1638(a)(9) and 1639(a)(7).[45]

Certainly, where the Board has issued no official statements concerning acceleration, and the opinion letters and interpretations are inadequate, the Court itself should address the major policy issues concerned here. Indeed, this Court has not hesitated to use its own independent judgment where agency findings and interpretations have been at odds with the Court's view of the broad congressional purposes underlying a statute. *See Morton* v. *Ruiz,* 415 U.S. 199 (1974); *Automatic Canteen Co.* v. *Federal Trade Commission,* 346 U.S. 61 (1953); and *Zuber* v. *Allen,* 396 U.S. 168 (1969). And, even where such a conflict between an interpretation and congressional intent has not been as apparent, the Court has used its own independent judgment where broad policy issues have arisen. *Texas Gas Transmission Corp.* v. *Shell Oil Co.,* 363 U.S. 263 (1960); *Commissioner* v. *Tellier,* 383 U.S. 687 (1966).

[45] 15 U.S.C. §1638(a)(9) requires disclosure in sale transactions of "default delinquency, or similar charges payable in the event of late payments." 15 U.S.C. §1639(a)(7) applies the same language to loan transactions. Reg. Z §226.8(b)(4) mandates the same disclosure for both sales and loans.

D. *The "Good Faith Conformity" Defense of the Act Is Designed Solely as an Equitable Defense to Individual Creditor Liability, and Confers No Validity on Any Regulatory Provisions or Agency or Staff Interpretations.*

Congress did not intend the "good faith conformity" defense of the Truth in Lending Act, 15 U.S.C. §1640(f), to confer any validity on interpretations issued by the Board and its staff. Rather, it only provides a personal defense against liability to a creditor who has acted in "good faith conformity" with Regulation Z provisions or interpretations. There is absolutely nothing in this provision which states or even implies that, merely because a creditor may act in conformity with a staff informal letter or staff interpretation, the letter or interpretation is binding on any judicial construction of the Act. Otherwise, no regulation or interpretation which a single creditor claimed to have relied upon could ever be found invalid, no matter how incorrect. Indeed, the clear language of §1640(f)

expressly contemplates the opposite conclusion, that courts can and may find such regulations or interpretations invalid. Section 1640(f) provides that the defense exists,

> . . . notwithstanding that after such act or omission has occurred, such rule, regulation, interpretation, or approval is amended, rescinded, *or determined by judicial or other authority to be invalid for any reason.* [emphasis supplied][46]

The legislative history accompanying Section 1640(f), which was added in 1974 and amended in 1976,[47] confirms this conclusion. In 1976, Senator Proxmire urged adoption of the language which eventually was placed within the statute:

> In addition the House amendment would authorize the Federal Reserve Board to delegate to its staff the authority to issue interpretations or approvals that would have binding effect in subsequent litigation over violations of the Truth in Lending Act. That is, *compliance with such an interpretation would constitute an absolute defense to a creditor until that interpretation was reversed by higher authority.* . . . [emphasis supplied][48]

Thus, Congress explicitly expected a court to examine the validity of a staff letter or interpretation, and even a provision of Regulation Z itself, regardless of the fact that some creditor might have relied on it.

This approach does not lead to "absolute chaos" in the

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[46] The brief of *amicus* United States, at 34, erroneously states that Congress intended "beyond question" to bar judicial review of agency interpretations. The statutory language is in explicit contradiction to this assertion.

[47] Added by Pub.L. 93-495, 88 Stat. 1518 (Oct. 28, 1974); amended by Pub.L. 94-222, 90 Stat. 260 (Mar. 23, 1976).

[48] 122 Cong. Rec. 2837 (1976).

marketplace, contrary to Petitioners' argument.[49] In fact, creditors are provided more protection under the Truth in Lending Act than under most other statutes. The one-year statute of limitations on Truth in Lending Actions bars suits on contracts consummated over a year ago; and the "good faith conformity" defense provides a shield against liability for any creditor who relied on FC-0054 within the one-year limitation period. Certainly, FMCC should not claim the protection of the "good faith conformity" defense when the consummation of the Milhollin contract preceded the enactment of Section 1640(f).

Conclusion

The existence of an acceleration clause is an essential disclosure for consumers, in light of both the congressional policy underlying the Truth in Lending Act and the devastating results of the exercise of such clauses by creditors. Disclosure of the right to accelerate payments is mandated here by §128(a)(9) of the Act and §226.8(b)(4) of Regulation Z, for in the transactions at hand FMCC imposed a "charge" for late payments in three different ways. Further, the Court is not obliged to defer to statements by the Federal Reserve Board or its staff here, but instead should require disclosure of the right to accelerate payments regardless of creditor policy or state law concerning rebate of unearned finance charges. The opinion of the Circuit Court therefore should be affirmed.

Respectfully submitted,

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[49] Petitioners' Brief at 26.

WASHINGTON

CONSUMER LOAN NOTE

Date________________, 19______

The words I and me mean all borrowers who signed this note. The word bank means The National Bank of Washington.

Promise to Pay

__________months from today, I promise to pay to The National Bank of Washington ____dollars($).

Responsibility

Although this note may be signed below by more than one person, I understand that we are each as individuals responsible for paying back the full amount.

Breakdown of Loan

This is what I will pay:

Amount of loan	1. $__________
Credit Life Insurance (optional)	2. $__________
Other (describe) ____________________	3. $__________
Amount Financed (Add 1 and 2 and 3)	4. $__________
FINANCE CHARGE	5. $__________
ANNUAL PERCENTAGE RATE	__________%
Total of Payments (Add 4 and 5)	$__________

Repayment

This is how I will repay:
I will repay the amount of this note in_________equal uninterrupted monthly installments of $__________ each on the_______day of each month starting on the _______day of _______________, 19____, and ending on____________________________, 19____.

Prepayment

If I pay this loan off in full, ahead of schedule, I will not have to pay the full finance charge. I will pay a finance charge on the amount I have borrowed (amount financed) only for the number of days I have had the loan—from the day I received the loan until the day I pay off the loan.

Late Charge

Any installment not paid within ten days of its due date shall be subject to a late charge of 5% of the payment, not to exceed $5.00 for any such late installment.

Security

To protect The National Bank of Washington, I give what is known as a security interest in my auto and/or other: (Describe)________________________________.
See the security agreement.

Credit Life Insurance

Credit life insurance is not required to obtain this loan. The bank need not provide it and I do not need to buy it unless I sign immediately below. The cost of credit life insurance is $_________for the term of the loan.

Signed: ____________________________ Date:__________

Default

If for any reason I fail to make any payment on time, I shall be in default. The bank can then demand immediate payment of the entire remaining unpaid balance of this loan, without giving anyone further notice. If I have not paid the full amount of the loan when the final payment is due, the bank will charge me interest on the unpaid balance at six percent (6%) per year.

Right of Offset

If this loan becomes past due, the bank will have the right to pay this loan from any deposit or security I have at this bank without telling me ahead of time. Even if the bank gives me an extension of time to pay this loan, I still must repay the entire loan.

Collection Fees

If this note is placed with an attorney for collection, then I agree to pay an attorney's fee of fifteen percent (15%) of the unpaid balance. This fee will be added to the unpaid balance of the loan.

Co-borrowers

If I am signing this note as a co-borrower, I agree to be equally responsible with the borrower for this loan. The bank does not have to notify me that this note has not been paid. The bank can change the terms of payment and release any security without notifying or releasing me from responsibility for this loan.

Copy Received

I received a completely filled in copy of this note. If I have signed for Credit Life Insurance, I received a copy of the Credit Life Insurance certificate.

Borrower:______________________________

____
Address

Co-borrower:___________________________

____
Address

Co-borrower:___________________________

____
Address

CONSUMER CREDIT HOTLINE: If you have any questions, please call us immediately at (202) 624-3619.

1-Bank's copy 2-Customer's copy 3-File copy

First National City Bank

Consumer Loan Note Date______________________, 19_____

(In this note, the words **I, me, mine** and **my** mean each and all of those who signed it. The words **you, your** and **yours** mean First National City Bank.)

Terms of Repayment To repay my loan, I promise to pay you ____________________________________ Dollars ($___________). I'll pay this sum at one of your branches in _________ uninterrupted _______________ installments of $_________ each. Payments will be due ______________________________, starting from the date the loan is made.

Here's the breakdown of my payments:

1.	Amount of the Loan	$__________	
2.	Property Insurance Premium	$__________	
3.	Filing Fee for Security Interest	$__________	
4.	Amount Financed (1+2+3)		$__________
5.	**Finance Charge**		$__________
6.	Total of Payments (4+5)		$__________

Annual Percentage Rate______%

Prepayment of Whole Note Even though I needn't pay more than the fixed installments, I have the right to prepay the whole outstanding amount of this note at any time. If I do, or if this loan is refinanced—that is, replaced by a new note—you will refund the unearned **finance charge,** figured by the rule of 78—a commonly used formula for figuring rebates on installment loans. However, you can charge a minimum **finance charge** of $10.

Late Charge If I fall more than 10 days behind in paying an installment, I promise to pay a late charge of 5% of the overdue installment, but no more than $5. However, the sum total of late charges on all installments can't be more than 2% of the total of payments or $25, whichever is less.

Security To protect you if I default on this or any other debt to you, I give you what is known as a security interest in my O Motor Vehicle and/or ____________________ (see the Security Agreement I have given you for a full description of this property), O Stocks, O Bonds, O Savings Account (more fully described in the receipt you gave me today) **and** any account or other property of mine coming into your possession.

Insurance I understand I must maintain property insurance on the property covered by the Security Agreement for its full insurable value, but I can buy this insurance through a person of my own choosing.

Default I'll be in default:

1. If I don't pay an installment on time; or
2. If any other creditor tries by legal process to take any money of mine in your possession.

You can then demand immediate payment of the balance of this note, minus the part of the **finance charge** which hasn't been earned figured by the rule of 78. You will also have other legal rights, for instance, the right to repossess, sell and apply security to the payments under this note and any other debts I may then owe you.

Irregular Payments You can accept late payments or partial payments, even though marked "payment in full", without losing any of your rights under this note.

Delay in Enforcement You can delay enforcing any of your rights under this note without losing them.

Collection Costs If I'm in default under this note and you demand full payment, I agree to pay you interest on the unpaid balance at the rate of 1% per month, after an allowance for the unearned **finance charge.** If you have to sue me, I also agree to pay your attorney's fees equal to 15% of the amount due, and court costs. But if I defend and the court decides I am right, I understand that you will pay my reasonable attorney's fees and the court costs.

Comakers If I'm signing this note as a comaker, I agree to be equally responsible with the borrower. You don't have to notify me that this note hasn't been paid. You can change the terms of payment and release any security without notifying or releasing me from responsibility on this note.

Copy Received The borrower acknowledges receipt of a completely filled-in copy of this note.

Signatures	Addresses
Borrower: ____________________	____________________
Comaker: ____________________	____________________
Comaker: ____________________	____________________
Comaker: ____________________	____________________

Hot Line If something should happen and you can't pay on time, please call us immediately at (212) 559-3061.

Personal Finance Department
First National City Bank

FNB 668 Rev. 1/75

IN THE

Supreme Court of the United States

October Term, 1979
No. 78-1487

FORD MOTOR CREDIT COMPANY, *et al.*,
Petitioners,

vs.

DENNIS MILHOLLIN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

REPLY BRIEF FOR THE PETITIONERS.

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I
INTRODUCTORY STATEMENT AND SUMMARY OF ARGUMENT.

This Reply Brief for the Petitioners is filed in response to the Brief for the Respondents[1] and the Brief Amicus Curiae of National Clients Council, Inc.[2] (herein "Clients Council").

The issue in these cases is whether any disclosures are required under the Truth in Lending Act (herein "Act") or Regulation Z promulgated by the Board of Governors of the Federal Reserve System (herein

[1]Cited herein as "Resp. Br."

[2]Cited herein as "A.C. Br."

"Regulation") by reason of the existence in a consumer credit contract of an acceleration clause.[3]

Neither the Act nor the Regulation even mention acceleration and neither specifically requires any disclosure of the right of acceleration. Respondents and Clients Council claim, nevertheless, that acceleration disclosures are required by section 226.8(b)(4) of the Regulation. That section requires disclosure of the amount or method of computing the amount of any default, delinquency or similar charges payable in the event of the late payment of contract installments. In addition, Respondents claim that acceleration disclosures are required by section 226.8(b)(7) of the Regulation which requires disclosure of the creditor's rebate policy upon prepayment in full of a consumer credit contract.

The Respondents build their entire case against the Petitioners upon the erroneous assumption that the creditor's exercise of the right of acceleration of an indebtedness is a prepayment of the indebtedness. In effect, Respondents claim that when a creditor demands payment of the unpaid balance of an indebtedness

[3]The facts in these cases are for the most part undisputed. Respondents, however, have mischaracterized the actions of the Petitioners with respect to the default in the *Milhollin* case. The Milhollins were in default under the contract almost from the date that it was signed. They refused to purchase insurance on the vehicle as promised and their failure to make the monthly installment payments as scheduled is apparent from a review of the payment record cited by Respondents. Resp. Br. at 5 n. 7. The efforts of FMCC to persuade the Milhollins to comply with the terms of the contract are detailed in the affidavit of Peter J. Deckers. J.A. at 23-25. These efforts included several letters and at least 10 telephone calls. The reference by Respondents to the Milhollins' loss of the payments they made on the vehicle, Resp. Br. at 6, conveniently ignores the Petitioners' much larger investment in the vehicle which was exposed by the Milhollins' default.

upon the debtor's default, this demand for payment is itself a payment by the debtor for purposes of the Act and the Regulation. In this Reply Brief, Petitioners will show that prepayment and acceleration are antitheticals, not equals. The term prepayment means a *payment* of an indebtedness before the scheduled maturity date specified in the contract. Acceleration, on the other hand, is the act by which the creditor *demands payment* of an indebtedness as a result of the debtor's default. The creditor's exercise of the right of acceleration may result in a prepayment of the indebtedness by the debtor, but it often does not.

Respondents have also misconceived the nature and function of a rebate of precomputed finance charges. In a precomputed contract, finance charges are computed based upon the amount of credit extended and the length of time it is to be outstanding *i.e.,* until the final installment payment date. No rebate would or should be made unless and until payment is received since up to that point the credit is still outstanding. It is only when payment is received in advance of the scheduled payment date that there is any reason to rebate any part of the finance charges. If payment is not received in advance of the scheduled date, the finance charges are fully earned and no rebate would be due. Acceleration is only the exercise of a right to advance the due date of payment. But until payment is actually made, no rebate comes into play since the finance charges continue to be earned until payment.

The Federal Reserve Board (herein "Board") has issued an Official Staff Interpretation concerning the application of sections 226.8(b)(4) and 226.8(b)(7)

of the Regulation to acceleration clauses.[4] Both Respondents and Clients Council concede in their briefs that if this Court approves the Official Staff Interpretation, the decision of the lower court must be reversed. Respondents and Clients Council agree that Petitioners have made all of the disclosures required by the Act and the Regulation as interpreted by the Board. This is also the position taken by the United States in its Amicus Curiae Brief filed at the invitation of this Court. In its Amicus Curiae Brief in Support of Petitioners, the United States urges that the Board's Official Staff Interpretation be approved and applied to these cases and that the decision of the lower court be reversed.

To counter this dilemma, Respondents and Clients Council take drastically conflicting positions. Clients Council argues that only official Board Interpretations of the Act and the Regulation are entitled to judicial deference. It asserts that Official Staff Interpretations are entitled to no deference even though they are issued pursuant to an express Congressional directive that was intended to promote creditor compliance with the Act and the Regulation and to discourage litigation. From this premise, Clients Council argues that the Official Staff Interpretation concerning acceleration should be disregarded and this Court should hold that the right of acceleration must always be disclosed as a "default, delinquency or similar charge" pursuant to section 226.8(b)(4) of the Regulation. This argument by Clients Council has been rejected not only by the Board but also by all seven federal courts

[4]Official Staff Interpretation No. FC-0054, 42 F.R. 18056, [1974-1977 Transfer Binder] Cons. Cred. Guide (CCH) ¶31,552, April 4, 1977.

of appeals that have considered it, including the Ninth Circuit in the decision below. In fact, the only case that Clients Council cite in support of their argument is a district court decision that has been expressly overruled.

Respondents understandably disagree with the position taken by Clients Council. Respondents argue that the Official Staff Interpretation concerning acceleration is sound since it furthers the disclosure purposes of the Act and the Regulation. Respondents, however, ask this Court to amend the Official Staff Interpretation so that it equates acceleration with prepayment and thereby requires the creditor to disclose, under section 226.8(b)(7) of the Regulation, its method of rebate upon acceleration. This argument by Respondents misconceives the role of the judiciary in reviewing agency interpretations of their own regulations. And, the amendment to the Official Staff Interpretation proffered by Respondents should be rejected in any event since it improperly equates acceleration with prepayment.

Both Respondents and Clients Council raise new issues that were never presented in any of the courts below and were not raised in the Petition for a Writ of Certiorari or the Answer to the Petition filed by the Respondents. Respondents argue that Petitioners have violated section 226.6(c) of the Regulation that prohibits creditors from disclosing additional credit information that contradicts, obscures or detracts attention from the information required to be disclosed by the Regulation. Respondents claim that acceleration and prepayment are equivalents and that Petitioners' prepayment rebate disclosure provided pursuant to section 226.8(b)(7) of the Regulation conflicts with the acceleration clause on the back side of the contracts.

Petitioners will demonstrate in this Reply Brief that acceleration and prepayment are not equivalents and that Petitioners' prepayment disclosure is consistent with the acceleration clause.

Clients Council raises a new issue that is not even pressed by the Respondents. Clients Council argues that the $15.00 acquisition fee that is referred to in Petitioners' prepayment rebate disclosure is a default charge within the meaning of section 226.8(b)(4) of the Regulation. This acquisition fee is a sum that is deducted in computing the rebate of unearned finance charges upon a prepayment of the contract. The acquisition fee is clearly disclosed under section 226.8(b)(7) of the Regulation and has nothing to do with a default under the contract. The claimed violation by Clients Council should be rejected.[5]

II

ACCELERATION AND PREPAYMENT ARE DISTINCT CONCEPTS AND SHOULD NOT BE EQUATED FOR PURPOSES OF THE ACT OR THE REGULATION.

A. Respondents Have Erroneously Equated Prepayment With Acceleration.

Throughout their brief, Respondents equate acceleration of a consumer credit contract with a prepayment of the contract. Respondents take the position that when a creditor demands payment of the unpaid balance of a consumer credit contract upon default, that demand for payment is itself a payment of the indebtedness for purposes of the Act and the Regulation. All of the violations of the Act and the Regulation alleged

[5]Clients Council also argues that, in the *Milhollin* case, FMCC actually retained $28.01 in unearned finance charges. This argument is premised upon a miscalculation by Clients Council of the unearned finance charges applicable to the Milhollin account. *See* note 11, *infra*.

by the Respondents stem from and rest upon this faulty premise. For example:

(1) Respondents claim that acceleration should be equated with prepayment, thereby bringing acceleration within the prepayment disclosure requirements of section 226.8(b)(7) of the Regulation. Upon this basis, Respondents claim that under section 226.8(b)(7), a creditor must disclose its method of rebating unearned finance charges "upon acceleration." If the creditor rebates under one method "for acceleration" and another for voluntary prepayment, Respondents contend that separate disclosures are required. Resp. Br. at 9, 22, 23, 24, 40, 41, 49.

(2) Respondents claim that acceleration, like prepayment, involves an early "termination" of the contract that should occasion a rebate of unearned finance charges. If a creditor does not provide such a rebate upon acceleration, Respondents claim that the creditor has the right to collect and retain unearned finance charges and that right must be disclosed as a default charge under section 226.8(b)(4) of the Regulation. Resp. Br. at 8, 9, 11, 19, 24, 26, 39, 43, 44, 47. This is so, according to Respondents, even though both the creditor's contract and state law provide that the creditor must rebate unearned finance charges upon any prepayment of the indebtedness following acceleration.

(3) Respondents claim that since acceleration constitutes a prepayment, an acceleration clause that does not provide for a rebate of unearned finance charges upon acceleration conflicts with a prepayment clause that discloses such a rebate. Resp. Br. at 10, 25, 26.

In short, the equation of acceleration with prepayment is a central thesis of Respondents' brief that forms an indispensable basis for each of their claims that Petitioners have violated the Act and the Regulation.[6]

B. Prepayment and Acceleration Are Not Equals.

The critical difference between acceleration and prepayment can be easily demonstrated. The term "prepayment" means a payment of the indebtedness before the originally scheduled maturity date as set forth in the installment contract. Acceleration on the other hand, is the act by which the creditor, upon the debtor's default under the contract, declares that all unpaid installments are due and payable. Acceleration may ultimately result in a prepayment if the debtor, after acceleration, pays the indebtedness in full before the originally scheduled maturity date. However, acceleration often does not result in a prepayment since a debtor who is in default in making one or more installment payments under the contract is not likely to be in a position to pay all of the installments at once. As stated in the brief filed by Clients Council:

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[6]It is interesting that Respondents' brief is not internally consistent on this point. Although Respondents claim throughout their brief that acceleration and prepayment should be equated, they devote one entire section of their brief to an argument that "Acceleration and Prepayment are Separate Concepts, Both Legally and In the Mind of the Average Consumer." Resp. Br. at 36. The brief filed by Clients Council vigorously assails Respondents' proposition that acceleration and prepayment are equals:

> "This equation of acceleration of payments with voluntary prepayment is totally erroneous from both the consumer's and creditor's perspective, as is evident from an elementary comparison of the processes involved." A.C. Br. at 35.

> "The consumer who has fallen behind on monthly payments rarely is capable of making a lump sum payment upon demand; indeed, the regular payment typically has been late precisely because of inability to pay even this smaller sum. Few creditors expect actual payment of the accelerated payment upon demand; rather, they anticipate the additional events of repossession and a deficiency judgment." A.C. Br. at 35.

Acceleration is thus the act by which the creditor *attempts* to obtain prepayment in full of the contract:

> "As I view it, acceleration is but the first step by the lender in *attempting* to obtain prepayment from the borrower; in no sense can acceleration and prepayment be equated." *Perry v. Liberty Consumer Discount Co.*, 433 F. Supp. 1352, 1359 (E.D. Pa. 1977), *aff'd mem.*, 577 F.2d 728 (3d Cir. 1978) (emphasis in original).

Contrary to the claim made by Respondents throughout their brief, acceleration does not "terminate" the contract relationship between the parties. The contract is terminated only when the indebtedness is paid in full following acceleration. Until that payment is made, the debtor has the continued use of the creditor's funds and all finance charges continue to be earned. There are no unearned finance charges that should be rebated upon acceleration.

The acceleration clause in the Petitioners' contracts entitles FMCC to demand payment of the unpaid balance upon a default under the contracts. The clause does not provide for a rebate of unearned finance charges upon acceleration because, as explained above. acceleration is not a prepayment of the indebtedness

and there are no unearned finance charges to be rebated upon acceleration. It would be inaccurate, misleading and confusing for FMCC to disclose that it rebates unearned finance charges upon acceleration since there are no unearned finance charges to rebate upon acceleration and no rebate is provided. In fact, if FMCC had made either the disclosure suggested by the Respondents[7] or the disclosure suggested by Clients Council,[8] Respondents and Clients Council would now be claiming that FMCC violated the Act by disclosing that it rebates unearned finance charges "upon acceleration" when no such rebate is provided.[9]

Should the buyer elect to prepay the indebtedness following an acceleration by FMCC, paragraph 14 on the front side of the FMCC contract clearly provides and discloses that FMCC will rebate unearned finance charges:

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[7]Respondents suggest that FMCC should have made the following disclosure:

> "In the event of prepayment in full or acceleration of the obligation, Buyer shall receive a rebate of the unearned portion of the finance charge computed under the sum of the digits method." Resp. Br. at 42.

[8]Clients Council suggests that FMCC should have made the following disclosure:

> "If you (the buyer) pay any installment late or otherwise break this agreement, I (the seller) can demand the immediate payment of the entire amount of money you still owe me under this contract. You will receive a credit for unearned FINANCE CHARGES, computed by the sum of the digits method after first deducting $15.00." A.C. Br. at 9.

[9]The impossible task that creditors face in drafting disclosures that will not be attacked on some theory is further illustrated by the fact that the disclosures suggested by Respondents and Clients Council are not even consistent with each other. The disclosure suggested by Respondents, note 7, *supra*, violates the disclosure required by Clients Council, note 8, *supra*, since Respondents' disclosure does not identify the $15.00 acquisition fee. Clients Council insists that this fee is a default charge that must be separately disclosed. *See* A.C. Br. at 26-27.

> **"(14) Prepayment Rebate: Buyer may prepay his obligations under this contract in full at any time prior to maturity of the final instalment hereunder, and, if he does so, shall receive a rebate of the unearned portion of the Finance Charge computed under the sum of the digits method after first deducting an acquisition fee of $15.00. No rebate will be made if the amount is less than $1.00."** [J.A. 9, 65]

This clause requires a rebate if the buyer pays the indebtedness in full "at any time prior to maturity of the final instalment hereunder." The wording clearly applies to a payment in full by the buyer for any reason as long as the payment is made before the scheduled maturity date of the final installment as set forth in the contract. ***See Griffith v. Superior Ford,*** 577 F.2d 455, 460 n. 6 (8th Cir. 1978) (interpreting the identical FMCC disclosure form); *Perry v. Liberty Consumer Discount Co.*, 433 F. Supp. 1352, 1357-58 (E.D. Pa. 1977), *aff'd mem.*, 577 F.2d 728 (3d Cir. 1978).

When read together, the FMCC acceleration clause and the prepayment rebate clause in paragraph 14 of the contract are consistent. The acceleration clause entitles FMCC upon the buyer's default to demand that the buyer make all installment payments immediately. If the debtor prepays the contract in accordance with this demand, the prepayment clause clearly requires that the buyer be given a rebate of unearned finance charges.

The foregoing analysis of FMCC's contract is consistent with Oregon state law and FMCC's actual rebate practice. The Oregon rebate statute mandates a rebate of unearned finance charges upon any prepayment of the contract. O.R.S. § 83.620(1) (Or. L. 1977). *See*

Brief for the Petitioners at 7, n. 3. Pursuant to Oregon law, this statute becomes a part of the contract between the parties. *E.g., Ocean A. & G. Corp. Ltd. v. Albina M. I. Wks.*, 122 Ore. 615, 260 P. 229 (1927); *Yandell v. United States*, 208 F. Supp. 306 (D. Ore. 1962). Respondents admit that this statute applies to any payment of the indebtedness before the scheduled date of maturity of the obligation. Resp. Br. at 29. *See Griffith v. Superior Ford*, 577 F.2d 455, 460 n. 7 (8th Cir. 1978) (interpreting a nearly identical Minnesota rebate statute); *Perry v. Liberty Consumer Discount Co.*, 433 F.Supp. 1352, 1357-58 (E.D. Pa. 1977) *aff'd mem.*, 577 F.2d 728 (3d Cir. 1978). They claim, however, that this rebate requirement is somehow not applicable to a prepayment following acceleration because of section 83.660 of the Oregon Motor Vehicle Sales Act.[10] However, section 83.660 merely prevents arbitrary and unreasonable enforcement of an acceleration clause. It does not conflict with the rebate section of the Oregon Motor Vehicle Sales Act which clearly requires a rebate of unearned finance charges upon any prepayment of the contract, including a prepayment following acceleration.

In accordance with its rebate disclosure in paragraph 14 and the foregoing Oregon state law, FMCC's practice in all cases is to rebate unearned finance charges upon payment of the indebtedness following accelera-

[10]That section provides:

"Acceleration Provision. No provision in a retail installment contract by which, in the absence of the buyer's default, the holder may, arbitrarily and without reasonable cause, accelerate the maturity of any part or all of the time balance is enforceable. This section does not prohibit provisions in a retail installment contract accelerating any part or all of the time balance in the event of sale or transfer, or removal outside the state of the motor vehicle covered by the contract." O.R.S. 83.660 (Or. L. 1977).

tion. J.A. 22, 68. Both Respondents and Clients Council strain to discover a conflict between the FMCC rebate policy articulated in the Plummer affidavit filed in the *Milhollin* case (J.A. 22) and the FMCC rebate policy articulated in the Bellisario affidavit filed in the *Eaton* case (J.A. 68). Resp. Br. at 30-31; A.C. Br. at 25. There is no conflict between the affidavits. The Plummer affidavit states that if FMCC decides to accelerate the indebtedness upon default, the method of computing the rebate is the same as that provided upon voluntary prepayment. The Plummer affidavit does not state when the rebate is actually provided to the buyer. The Bellisario affidavit makes it clear that the rebate is provided to the buyer when FMCC is actually prepaid following acceleration.[11]

[11]Clients Council claims that in the *Milhollin* case FMCC actually retained $28.01 in unearned finance charges. A.C. Br. at 19, 20. This claim is simply not supportable. In the first place, the Milhollins did not at any time prepay the contract indebtedness, so that FMCC could not have retained any unearned finance charges as claimed by Clients Council. The payoff quotation of $2,440.42 supplied to the Milhollins (J.A. 18) was derived as follows: $3,084.64 (total of payments), plus $263.52 (vendors single interest insurance premium), plus $22.23 (V.S.I. insurance premium service charge), plus $24.50 (repossession expenses), plus $9.73 (late charges); less $342.72 (installment payments made by the Milhollins), less $424.79 (finance charge rebate), less $176.56 (V.S.I. insurance premium rebate), less $20.13 (V.S.I. insurance premium service charge rebate).

The $28.01 difference between the quotation calculated by Clients Council and the accurate quotation as supplied by FMCC results from: (1) the failure of Clients Council to take into account the $22.23 V.S.I. insurance premium service charge; (2) the failure of Clients Council to take into account the $24.50 repossession expenses; (3) the use by Clients Council of the wrong rebate decimal for the rebate of V.S.I. insurance premiums since the V.S.I. insurance was purchased on October 4, 1974 which was after the contract was signed, and (4) the use by Clients Council of a finance charge rebate decimal based upon the February, 1975 installment payment date rather

(This footnote is continued on next page)

III

THE FEDERAL RESERVE BOARD'S OFFICIAL STAFF INTERPRETATION SHOULD BE FOLLOWED.

A. Introductory Statement.

The Board has issued an Official Staff Interpretation[12] concerning acceleration disclosures. This Official Staff Interpretation was preceded by a Staff Letter[13] and was followed by two additional Staff Letters.[14] Both Respondents and Clients Council admit that the decision of the lower court must be reversed if the Board's Official Staff Interpretation is applied since the Petitioners' disclosures comply with that Interpretation.

Neither Respondents nor Clients Council make any effort in their briefs to read the Official Staff Interpretation and the Staff Letters together. Instead, they focus on isolated passages from two of the Staff Letters and attempt to establish through hypothetical analysis and multiple supposition that the Board could have done a better job. They have failed to establish that

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than the March, 1975 installment date. FMCC's use of the March, 1975 finance charge rebate decimal is dictated by the Oregon rebate statute, O.R.S. § 83.620(1) (Or. L 1977), and provided the Milhollins with a payoff quotation that was good for the entire period of statutory redemption applicable to the vehicle.

[12]Official Staff Interpretation No. FC-0054, 42 F.R. 18056, [1974-1977 Transfer Binder] Cons. Cred. Guide (CCH) ¶31,552, April 4, 1977. *See* Brief for the Petitioners, App. B at 18-20.

[13]Federal Reserve Board Staff Letter No. 851, [1974-1977 Transfer Binder] Cons. Cred. Guide (CCH) ¶31,173, October 22, 1974. *See* Brief for the Petitioners, App. B at 20-21.

[14]Federal Reserve Board Staff Letter No. 1208, [1974-1977 Transfer Binder] Cons. Cred. Guide (CCH) ¶31,647, July 6, 1977; Federal Reserve Board Staff Letter No. 1324, Cons. Cred. Guide (CCH) ¶31,824, November 14, 1978. *See* Brief for the Petitioners, App. B at 22-26.

the Official Staff Interpretation is plainly erroneous and they offer no convincing reason why it should not be followed.

B. Restatement of the Federal Reserve Board's Official Staff Interpretation.

1. Section 226.8(b)(4).

Section 226.8(b)(4) of the Board's Regulation provides that the creditor shall disclose "the amount, or method of computing the amount, of any default, delinquency, or similar charges payable in the event of late payments." 12 C.F.R. § 226.8(b)(4) (1978).[15]

In the Official Staff Interpretation, the Board's Staff concluded that the phrase "default, delinquency or similar charges" refers to specific pecuniary sums payable with the late payment of contract installments. It does not apply to the right of acceleration or to other contract remedies exercisable upon default. The Board's Official Staff Interpretation is clearly supported by the plain meaning of the terms used in the Act and the Regulation and by the legislative history of the Act.[16]

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[15]The default charge disclosure requirement in the Act is similar. It requires disclosure of "the default, delinquency, or similar charges payable in the event of late payments." Truth in Lending Act § 128(a)(9), 15 U.S.C. § 1638(a)(9) (1976).

[16]*See* Brief for the Petitioners at 34-38; Brief for the United States as Amicus Curiae at 16-22. Clients Council argues that the Board's Interpretation renders the term "default charge" meaningless since late payment penalties of the type described by the Board are universally referred to as "delinquency charges." A.C. Br. at 12-13. However, such late payment penalties are referred to interchangeably as default charges and delinquency charges. *See e.g.*, Mich. Comp. Laws § 492.120; N.C. Gen. Stat. § 25A-29; Pa. Stat. Ann. tit. 69, § 621, all referring to late payment penalties as "default charges."

The Official Staff Interpretation states that the Staff views a payment following acceleration as essentially a prepayment of the contract obligation. If the creditor rebates unearned finance charges upon such a prepayment following acceleration in accordance with its rebate disclosure, no default charges are imposed by reason of the acceleration. However, the Staff concluded that if the creditor does not rebate unearned finance charges upon payment of the indebtedness following acceleration in accordance with its prepayment rebate disclosure, then the amount of unearned finance charges retained by the creditor is a form of default charge that must be disclosed.[17]

Respondents and Clients Council attack the Official Staff Interpretation by focusing upon claimed ambiguities and inconsistencies in certain of the Staff Letters. First, they claim that Staff Letter 851, written before the Official Staff Interpretation was published, equated acceleration with prepayment which is inconsistent with the Official Staff Interpretation. Resp. Br. at 45; A.C. Br. at 34-35. However, Staff Letter 851 did not state that the Staff views acceleration as a prepayment. In Staff Letter 851, the Staff stated that it views an *acceleration of payments* as a prepayment. In the subsequent Official Staff Interpretation, the Staff made it clear that in Staff Letter 851 it was referring to a *payment following acceleration* as a prepayment. *See* Brief for the Petitioners at 41-42. The Staff Letter and Official Staff Interpretation are therefore consistent and correct.

[17]The Board's Staff could have logically concluded that even where the creditor does not rebate unearned finance charges upon payment of the indebtedness following acceleration, no default charge disclosures are required. The creditor's failure to provide such a rebate increases only the yield to the creditor on the transaction since the creditor's funds will have been outstanding over a shorter period of time. This increase in the yield caused by a default, acceleration and repossession was considered by Congress to be "a subsequent event or occurrence" that would not trigger disclosure obligations under the Act or the Regulation. *See* Brief for the Petitioners at 38 and n. 23.

Second, Respondents and Clients Council complain that under Staff Letter 1208 a creditor having the contract right to retain unearned finance charges upon payment of the indebtedness following acceleration may avoid disclosure of that right by relying upon a hidden policy not to enforce that right. Resp. Br. at 51-52; A.C. Br. at 39-42. Even if Respondents and Clients Council were properly interpreting Staff Letter 1208, their concerns are not well founded. FMCC is required by its contract/disclosure statement and by Oregon state law to rebate unearned finance charges upon payment of the indebtedness following acceleration. For this reason, it could not unilaterally change its rebate policy as hypothesized by Respondents and Clients Council.

In any event, Respondents and Clients Council have misread Staff Letter 1208. That Letter does not deal with a case where the contract permits the creditor to retain unearned finance charges upon payment of the indebtedness following acceleration. Staff Letter 1208 was speaking to the usual case where the disclosure statement provides for a rebate upon prepayment and the contract contains an acceleration clause that is silent concerning the creditor's rebate policy upon payment of the indebtedness following acceleration. In this case, the Staff stated in its Letter that since payment of the indebtedness following acceleration

is viewed as a prepayment, the creditor's prepayment rebate disclosure under section 226.8(b)(7) would apply and be controlling. As long as the creditor rebates unearned finance charges in accordance with its prepayment rebate disclosure, no further disclosure is required. However, if the creditor does not consider its prepayment rebate disclosure as controlling, then default charges disclosures would be required. This reading of the Letter would require the creditor to disclose and adhere to its rebate policy when the contract is entered into and thus removes the purely hypothetical concerns of Respondents and Clients Council.

2. Section 226.8(b)(7).

Section 226.8(b)(7) of the Regulation requires the creditor to disclose its method of rebate upon prepayment in full of the contract.[18] In its Official Staff Interpretation and Staff Letters, the Board's Staff has stated that a payment following acceleration is viewed as a prepayment; and the creditor's general disclosure of its rebate policy upon prepayment is sufficient. It is not necessary for the creditor to separately disclose its rebate policy upon payment of the indebtedness after acceleration. The Staff did not feel that the prepayment rebate disclosure should be unduly complicated and lengthened by referring to all of the possible events that could lead to a prepayment by the debtor.[19]

[18]12 C.F.R. §226.8(b)(7) (1978). This section of the Regulation has no counterpart in the Act.

[19]A debtor may choose to prepay a consumer installment contract for an infinite variety of reasons. Examples are: the desire to discharge the indebtedness early and receive a rebate of unearned finance charges; the desire to discharge the indebtedness early because the creditor has demanded payment as a result of a default under the contract; the desire to refinance the indebtedness; or the desire to sell or trade in collateral.

As stated by the United States in its Amicus Curiae Brief in favor of Petitioners:

> "Payment resulting from acceleration is, as the Board staff has correctly concluded, comparable to voluntary prepayment, which similarly involves early discharge of the loan obligation. Since the creditor's rebate policy on prepayment is already subject to disclosure, the Board staff has consistently interpreted Regulation Z since 1974 (see Pet. App. E 57a) to require a separate disclosure statement with respect to payment after acceleration only when the rebate in that event is different than the prepayment rebate." Brief for the United States at 26.
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> . . .
>
> "[T]he Board's position carries out the congressional purpose of informing the borrower of the cost of credit. If the rebate in the event of voluntary prepayment and payment after acceleration is the same and the creditor discloses the rebate policy with respect to voluntary prepayment, there is no significant public policy served by providing the borrower with a redundant separate disclosure of the rebate policy on acceleration, as the Ninth Circuit required in *St. Germain* and the instant cases." Brief for the United States at 24.

Respondents and Clients Council refer to an assortment of state laws that, unlike the Oregon statute, require a rebate of finance charges at dates other than a prepayment by the debtor. Resp. Br. at 46 and App. A; A.C. Br. at 38. However, neither the Act nor the Regulation require the creditor to disclose these state laws that have no relationship to a "prepayment" as that term is used in section 226.8

(b)(7). The Board has wisely concluded that the creditor's disclosure form should not be further lengthened and complicated by the disclosure of these state laws.

C. The Official Staff Interpretation Should Be Followed.

The Board's Official Staff Interpretation of the Regulation should be upheld unless it is plainly erroneous, even if alternative interpretations are available such as those proffered by the Respondents and Clients Council. *E.g., Zenith Radio Corp. v. United States,* 437 U.S. 443, 450-51 (1978); *Mourning v. Family Publications Service, Inc.,* 411 U.S. 356, 371-72 (1973); *Griggs v. Duke Power Co.,* 401 U.S. 424, 433-34 (1971); *Power Reactor Development Co. v. Electricians,* 367 U.S. 396, 408 (1961); *Udall v. Tallman,* 380 U.S. 1, 16-17 (1965).

The rule of judicial deference to agency interpretations applies with special force to the Act and the Regulation. *Mourning v. Family Publications Service, Inc.,* 411 U.S. 356 (1973). *See* Brief for the Petitioners at 21-26. This rule of deference has received explicit Congressional approval in the specific context of Official Staff Interpretations. The express purpose of Congress in enacting section 130(f), 15 U.S.C. § 1640(f) (1976), was to vest the Board and its Staff with the authority to issue interpretations of the Act and the Regulation that could be safely relied upon by the credit industry in drafting disclosure forms. *See* Brief for the Petitioners, App. A at 10-17.

These cases graphically illustrate the dilemma faced by the consumer credit industry in drafting disclosure forms under the Act and the Regulation. The first

case to rule on the disclosure of acceleration clauses was *Garza v. Chicago Health Clubs, Inc.,* 347 F. Supp. 955 (N.D. Ill. 1972). In that case, the court held that an acceleration clause must always be disclosed as a "default, delinquency or similar charge" under section 226.8(b)(4) of the Regulation. Clients Council claims that, based upon this one decision, Petitioners and the credit industry should have immediately prepared and distributed new disclosure forms to comply with the court's holding. A.C. Br. at 9. This change in disclosure forms would have required an enormous expenditure of money by the industry[20] that would have been completely wasted since the holding in *Garza* has been unanimously rejected by seven federal appellate courts.[21] What has emerged in place of *Garza* is a conflict in the circuit courts that leaves creditors with no clear disclosure rule to follow. This conflict in the circuits demonstrates the waste and futility involved in trying to redraft and disseminate disclosure forms to satisfy each new disclosure rule imposed by the courts. It also demonstrates the wisdom of Congress in delegating to the Board the authority to determine what disclosures are required by the Act and the Regulation.[22]

[20]The Amicus Curiae brief filed by the California Bankers Association points out that the cost to prepare and distribute new disclosure forms can exceed several million dollars for a single creditor having nationwide operations. Brief for the California Bankers Association as Amicus Curiae at 16.

[21]*See* note 25, *infra.*

[22]The central theme of the three Amicus Curiae Briefs filed by the credit industry is the desperate need for a ruling from this Court confirming the authority of the Board and its Staff to issue interpretive guidelines that can be safely relied upon in drafting disclosure forms. *See* Brief of the Consumer Bankers Association as Amicus Curiae; Brief for the California Bankers Association as Amicus Curiae; Brief Amici Curiae of National Consumer Finance Association and General Motors Acceptance Corporation.

Application of a rule of deference to both Board and Staff Interpretations recognizes the Board's specialized expertise and promotes the Congressional goals of simplicity, uniformity and understandability in credit cost disclosures—goals that are rapidly being submerged in a sea of Truth in Lending litigation.[23]

Applying this rule of deference, it is clear that the Official Staff Interpretation should be followed: it is reasonable; it is easy to understand and apply; it will promote the Congressional goals of simplicity and uniformity in credit cost disclosures; and it avoids the growing problem of disclosure overload.

Clients Council argues that this Court should not defer to the Official Staff Interpretation since the Board has not passed upon the acceleration question and Staff Interpretations are not entitled to judicial deference. A.C. Br. at 28-32. Acceptance of this argument would bring the administration of the Act and the

[23]The October 15, 1979 issue of the Washington Credit Letter reports that:

> "The number of Truth in Lending suits filed in federal district courts has reached an all-time high, according to new figures released by the administrative office of the U.S. Courts.
>
> During the 12 months ending last June 30, a total of 2,340 suits were filed, up 19.57 percent (383 cases) from 1977-78.
>
> The 1978-79 totals top the previous record of 2,237 suits filed in 1974-75." Washington Credit Letter at 5 (October 15, 1979).
>
> . . .
>
> "These figures reflect only the number of Truth in Lending suits filed in federal district courts. They do not include TinL suits filed in state courts or in bankruptcy proceedings in which alleged Truth in Lending violations are raised by way of counterclaim or offset. No central agency collects statistics on these filings." Washington Credit Letter at 8 (October 15, 1979).

Regulation to a virtual standstill. The Board is obviously not in a position to address every question of interpretation that may arise under the Act and the Regulation. It has therefore delegated to its Division of Consumer Affairs the primary responsibility to interpret the complex disclosure requirements of the Act and the Regulation. 41 F.R. 28256, July 9, 1976; 43 F.R. 18540, May 1, 1978. Only controversial issues involving substantial ambiguities that raise significant policy questions are reserved to the Board. 41 F.R. 28256, July 9, 1976. This Board delegation to its Staff has received express Congressional sanction in the specific context of the Act and the Regulation. 15 U.S.C. § 1640(f) (1976).

Clients Council also asserts that Staff Interpretations are unreliable indicators of the Board's views since they are written by "lone Board employees" who are ill-equipped to provide a comprehensive analysis of the Regulation. A.C. Br. at 28-30. This claim by Clients Council is both unfair and unfounded. In many respects, the Staff is better equipped than the Board to handle the day-to-day interpretive questions that arise under the Act and the Regulation because of its specialized expertise and experience in matters involving consumer credit. In Public Information Letter No. 444, the Deputy Secretary of the Board stated:

> "A staff opinion represents the informed view of the particular official responding to the inquiry, who is authorized by the Board to express opinions on the particular subject. While it is possible that in some instances it might not represent the position which the Board members themselves would take if they formally considered the issue, the Board considers the present informal and flexible procedure, by which members of its staff provide

opinions on regulatory provisions, an essential part of its operations.

It is the Board's view that the public is entitled to rely on a formal staff opinion unless and until it is altered by the Board after formal consideration. Where the issue involves a statement of legal position, it may be assumed that while the question discussed has not been presented to, nor reviewed by the Board, such view is believed by the staff to be legally sound and judicially sustainable, and would be recommended by the staff for Board adoption should the matter be presented to the Board." Public Information Letter No. 444 [1969-1974 Transfer Binder] Cons. Cred. Guide (CCH) ¶30,640, March 1, 1971.

The Board has supplied the Solicitor General with a Memorandum describing the procedures used in issuing Official Staff Interpretations. The Solicitor General and the Board have authorized Petitioners to supply this Memorandum to the Court. The Memorandum is reprinted as Appendix A to this Reply Brief. The Memorandum establishes that Official Staff Interpretations are published only after they have been carefully reviewed, analyzed and approved at various levels in the Board, and such Interpretations are reviewed quarterly by members of the Board.

Finally, Clients Council claims that Staff Interpretations should be ignored because they are not subject to public review and comment. Clients Council states that the Official Staff Interpretation at issue in these cases was adopted before the Board established procedures that offer the opportunity for public review and comment. A.C. Br. at 28. This is simply not so. When Official Staff Interpretation No. FC-0054 was adopted, the Board had established procedures calling for publica-

tion of Official Staff Interpretations in the Federal Register, review by the public, and reconsideration upon request by any member of the public. 41 F.R. 28255-56, July 9, 1976. Official Staff Interpretation No. FC-0054 was published in the Federal Register in accordance with these procedures. 42 F.R. 18056, April 4, 1977. The Board's procedures for issuing Official Staff Interpretations currently in effect are equivalent to informal publication, notice and comment rulemaking under section 553 of the Administrative Procedures Act. *Compare* 5 U.S.C. § 553 (1976) *with* 43 F.R. 18539-18540, May 1, 1978.

Acceptance of the extreme arguments made by Clients Council would have an enormously disruptive effect upon the orderly administration of the Act and the Regulation.[24] It would also impose a penalty of truly staggering proportions upon the consumer credit industry. Clients Council argues that the Official Staff Interpretation concerning acceleration, which has been relied upon by the industry, should be rejected and that this Court should hold that the right of acceleration must be disclosed in all consumer credit contracts as a "default, delinquency or similar charge" under section 226.8(b)(4). Clients Council thus seeks to impose a multi-million dollar liability upon the consumer credit industry for failure to disclose acceleration clauses even though the Board has stated emphatically that such disclosures are not required and the United States Courts of Appeals for seven different circuits, including the court below, have unanimously agreed

[24]The United States points out in its Brief that judicial rejection of Official Staff Interpretations will prevent effective enforcement of the Act and the Regulation by the federal enforcement agencies. Brief for the United States as Amicus Curiae at 39 n. 18.

with the Board.[25] The only authority that Clients Council can garner to cast this massive punitive liability upon the industry is a district court decision[26] that has been expressly overruled on this very issue by the federal circuit court for its district.[27]

Respondents understandably reject the argument made by Clients Council. Respondents argue that the Official Staff Interpretation concerning acceleration is reasonable and should be adopted:

> "The Federal Reserve Board Staff has adopted an approach to the question of disclosure of finance charge rebates which is in accord with the principles of Truth in Lending. The Board's staff agrees that the effect of acceleration on the finance charge is important information to be disclosed to the consumer. Such a position is in accord with the purpose of the Act that the 'informed use of credit results from an awareness of the cost thereof by consumer,' and this position should be adopted. 15 USC § 1601(a)." Resp. Br. at 53.

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[25]*Johnson v. McCrackin-Sturman Ford, Inc.*, 527 F.2d 257 (3d Cir. 1975); *Martin v. Commercial Securities Co., Inc.*, 539 F.2d 521 (5th Cir. 1976), *as modified prospectively in McDaniel v. Fulton National Bank*, 571 F.2d 948 (5th Cir.) (*en banc*), *reh. denied*, 576 F.2d 1156 (5th Cir. 1978) (*en banc*); *Croysdale v. Franklin Savings Ass'n*, 601 F.2d 1340 (7th Cir. 1979); *Griffith v. Superior Ford*, 577 F.2d 455 (8th Cir. 1978); *St. Germain v. Bank of Hawaii*, 573 F.2d 572 (9th Cir. 1977); *Milhollin v. Ford Motor Credit Co.*, 588 F.2d 753 (9th Cir. 1978) (following *St. Germain*); *Begay v. Ziems Motor Co.*, 550 F.2d 1244 (10th Cir. 1977); *Price v. Franklin Investment Co., Inc.*, 574 F.2d 594 (D.C. Cir. 1978).

[26]*Garza v. Chicago Health Clubs, Inc.*, 347 F. Supp. 955 (N.D. Ill. 1972).

[27]*Croysdale v. Franklin Savings Ass'n*, 601 F.2d 1340 (7th Cir. 1979).

However, Respondents argue that the Staff should have equated acceleration with prepayment and, like the court below, required the creditor to disclose its rebate policy upon acceleration:

> "The rule of the Ninth Circuit is clear; it requires the creditor to disclose on the front of the contract whether a rebate of unearned finance charges will be made upon acceleration and the method by which the rebate will be made. This disclosure provides the consumer with all of the necessary information, and does not force the consumer to look elsewhere to find the information necessary to understand the effect of acceleration upon the finance charge." Resp. Br. at 49.

Respondents' argument should be rejected. Acceleration is not a prepayment and, for that reason, there are no unearned finance charges to be rebated upon acceleration. What Respondents are really attempting to accomplish through their proffered amendment to the Official Staff Interpretation is to indirectly require the disclosure of acceleration clauses which are not required to be disclosed by either the Act or the Regulation. The Official Staff Interpretation properly rejects the notion that acceleration and prepayment are equals. Instead, the Staff has concluded that payment following acceleration is essentially a prepayment and the creditor's prepayment rebate disclosure made under section 226.8(b)(7) is adequate. Since the Board's Official Staff Interpretation is a reasonable construction of its own Regulation, it should be considered controlling. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *Thorpe v. Housing Authority*, 393 U.S. 268, 276 (1969); *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965).

A more fundamental flaw in Respondents' argument is its unstated premise that a litigant may concede the reasonableness of an Official Staff Interpretation and at the same time seek judicial amendments to "improve" the Interpretation. Respondents have misconceived the role of the courts in reviewing agency interpretations. As stated by this Court in the specific context of the Regulation:

> "That some other remedial provision might be preferable is irrelevant. We have consistently held that where reasonable minds may differ as to which of several remedial measures should be chosen, courts should defer to the informed experience and judgment of the agency to whom Congress delegated appropriate authority." *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 371-72 (1973).

IV

THE NEW ISSUES RAISED FOR THE FIRST TIME IN THIS COURT BY RESPONDENTS AND CLIENTS COUNCIL HAVE NO MERIT.

A. Petitioners Have Not Violated Section 226.6(c) of the Regulation.

Respondents argue that Petitioners have violated section 226.6(c) of the Regulation which provides that:

> "At the creditor's or lessor's option, additional information or explanations may be supplied with any disclosure required by this Part, but none shall be stated, utilized, or placed so as to mislead or confuse the customer or lessee or contradict, obscure, or detract attention from the information required by this Part to be disclosed."

Respondents claim that since prepayment and acceleration are equivalents, Petitioners' prepayment rebate disclosure in paragraph 14 of the contract conflicts with the acceleration clause which does not disclose a rebate.

This argument is made by the Respondents for the first time in this Court. Respondents did not raise the argument or even cite section 226.6(c) in any brief or oral argument in any of the lower courts. The question was not listed as a question presented for decision in the Petition for a Writ of Certiorari or the Answer filed by the Respondents. Respondents' attempt to raise the issue at this late date violates Rule 23(1)(c) of the Rules of the Supreme Court of the United States.[28]

Even if the argument is considered, it should be rejected. Petitioners have already demonstrated that their prepayment rebate disclosure is consistent with and complements the acceleration clause. See discussion *supra* at pages 8-13. And, even if the two clauses were not consistent, the acceleration clause is on the reverse side of the contract and could hardly detract attention from the disclosures made on the front of the contract.

B. The $15.00 Acquisition Fee Has Been Properly Disclosed and Is Not a Default Charge as Claimed by Clients Council.

Clients Council raises a new issue that even Respondents do not assert. Clients Council asserts that the

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[28] This attempt by Respondents to inject a new issue into these cases in order to establish a violation of the Act and Regulation is not without precedent. The first time that Respondents raised section 226.8(b)(7) as an issue in these cases was in the Ninth Circuit after the decision was filed in *St. Germain v. Bank of Hawaii*, 573 F.2d 572 (9th Cir. 1977).

$15.00 fee that is deducted by Petitioners in calculating any rebate of unearned finance charges upon prepayment is a "default charge" that must be disclosed. A.C. Br. at 26-27.

This argument by Clients Council is difficult to follow since the acquisition fee is clearly disclosed by Petitioners in paragraph 14 on the front of the contract. J.A. 9, 65. The acquisition fee is an amount that is deducted in computing any rebate of unearned finance charges upon prepayment. It is not a "charge" imposed as a result of default and, in fact, has nothing to do with default under the contract. This claim by Clients Council should be rejected.

V
CONCLUSION.

For the reasons stated, Petitioners respectfully submit that the judgment of the court below should be reversed.

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APPENDIX A.

Memorandum.

BOARD OF GOVERNORS
of the
FEDERAL RESERVE SYSTEM

Date November 9, 1979
Office Correspondence
To Neil Butler and
Dolores S. Smith
From Lynne B. Barr
Subject: Issuance of Official
Staff Interpretations

As requested by the Justice Department, this memorandum is a brief summary of internal procedures employed by the Division of Consumer and Community Affairs from 1976 to the present with respect to official staff interpretations (OSIs) of Regulations B and Z. Many of these procedures were not changed when procedures for delayed effective dates and comment periods were adopted in 1978, and you can assume they are still in place unless I indicate otherwise.

It should be noted that the statutory provisions in question permit the Board to authorize any "official or employee of the Federal Reserve System" to issue interpretations or approvals under the regulations. One alternative available to the Board in 1976 was to authorize non-official staff members of the Board or other officials or employees of the System (such as Federal Reserve Bank personnel) to issue the interpretations. That course was not recommended by the staff to the Board because we felt that the interpretations should be uniform and should involve a relatively high level of review.

When the Board considered the designation of officials several Board members expressed concern about control and review of the interpretations. For that reason, a number of procedures were adopted by the Board. The first is the mandatory review of all OSIs by two officials of the Division. Each OSI is reviewed and initialed by one official before it is reviewed and signed by the official whose signature the letter bears.

Second, the Board decided that all OSIs would be reviewed quarterly by the Consumer Affairs Committee (the committee of Board members with oversight responsibility over the Division of Consumer and Community Affairs). At the time FC-0054 was issued, the Committee members reviewed the letters themselves. They now receive a summary of the letters.

Third, written internal procedures for preparation and issuance of the OSIs and unofficial interpretations were developed and circulated to all staff members. A copy of these procedures is attached.

The letters were and continue to be prepared in the following way. A request for an OSI is acknowledged and then assigned to a staff attorney for response. If the request appears incomplete or relevant documents were not included in the original request, the attorney will ask the requesting party for further information. A draft response to the letter is prepared, usually in consultation with other staff attorneys, section chiefs, and officials. An initial determination is made at that time whether or not the response should be official. This draft is often reviewed and discussed in group meetings with officials, section chiefs, and staff attorneys familiar with the subject matter. The letter is then issued after further review by the staff attorney's section chief and two officials.

As you know, OSIs were originally effective upon publication in the *Federal Register*, with provision for reconsideration upon request. One hundred forty-seven OSIs under Regulation Z and 10 under Regulation B were issued under this procedure. Of the Regulation Z OSIs issued between August 1976 and April 1978, approximately 6 were reconsidered, either by the Consumer Affairs Committee or the Board. None were changed.

In April 1978, the Board amended the procedures to provide a delayed effective date and a period for public comment if reconsideration of an OSI was requested. Of the 20 OSIs of Regulation Z issued since April 1978, 9 have been reconsidered; none were substantively changed as a result of the reconsideration and public comments.

Attachment
cc: Janet Hart

PROCEDURES FOR ISSUANCE OF INTERPRETATIONS OF REGULATIONS Z AND B

FAIR CREDIT PRACTICES SECTION
EQUAL CREDIT OPPORTUNITY SECTION

The purpose of this memorandum is to describe the procedures to be employed by staff of the Fair Credit Practices and Equal Credit Opportunity sections of OSCA in processing requests for Board interpretations and official staff interpretations of Regulations Z and B, and for issuance of unofficial staff opinion letters on those Regulations. Under these procedures, which are set forth in § 202.1(b) and (c) of Regulation B and § 226.1(c) and (d) of Regulation Z, there will be three kinds of interpretations of Regulations Z and B: (1) official Board interpretations, (2) official staff interpretations, and (3) unofficial staff interpretations. The procedures become effective July 30, 1976. A copy of the amendments to the Regulations is attached.

I. *Types of Interpretations*

1. *Formal Board interpretations* will continue to be issued only in response to those requests which involve "potentially controversial issues of general applicability which concern substantial ambiguities in the Regulations and raise significant policy questions." Board interpretations are published in the *Federal Register*.

2. *Official staff interpretations* will be issued in response to those requests which, in the opinion of one or more officers of OSCA, require clarification of technical ambiguities in the Regulation or which

have no significant policy implications. The official staff interpretations will be published in the *Federal Register*, with identifying details deleted. See Attachment A for examples.

3. *Unofficial staff interpretations* will be issued where the person making the request does not require the protection of the Act, where the issue is minor or has already been satisfactorily resolved, or where time strictures mandate a rapid response. These letters are not published in the *Federal Register* but may become part of the Board's Public Information file, depending on the significance of the opinion expressed therein. See Attachment B for examples.

II. *Processing of Requests*

Requests for interpretations of the Regulations will normally be addressed to the Director of OSCA. Letters addressed to other officials or employees of the Board, however, will also be considered as formal requests (if the nature of the request so indicates) and the same requirements will apply. All requests received in OSCA will be logged in, routed through the section chiefs of FCP and ECOA and assigned to individual staff members.

The assigned staff member will examine the request to determine that it contains a complete statement of all relevant facts, that all pertinent documents are included and properly incorporated and that the request states the specific provisions of the statute and Regulation which are at issue. If the request for interpretation is incomplete the staff member should either (1) acknowledge the request by mail and ask for more information, or (2) request the additional information by telephone. If by telephone, the person making the

request for interpretation should be asked to supply a copy of such additional information by mail in order to compile a complete written record of the relevant facts. It should be noted that while certain requirements for requests for interpretations are set forth in the Regulations (§ 226.1(d)(1) and § 202.13(c)(1)), these requirements are not inflexible and noncompliance with them should not be used to delay a request if the statement contained in the request is complete.

If the request for interpretation is complete (or upon receipt of the requested additional information), the staff member has five working days within which to make a recommendation to the section chief as to what type of response should be given. An initial determination as to the proper response will be made by the staff member and the section chief at that time. Within 15 days of the *receipt of the complete request by OSCA*, a substantive response will be sent to the person making the request or an acknowledgement will be sent which sets a reasonable time within which a substantive response will be given. Except in the most unusual cases, sixty days from the time a request is complete should be a sufficient amount of time in which to answer a request.

A discussion of the different types of interpretations, the criteria to be used in issuing such interpretations and varying procedures for their issuance is set forth below.

1. *Official Board interpretations* are formal interpretations of regulations issued only by the Board of Governors. They will be issued only upon those requests which involve "potentially controversial issues of general applicability which concern substantial ambiguities in the Regulations and raise significant policy questions."

When a determination is made by the staff member and section chief that a particular request poses issues of such significance that a formal Board interpretation may be desirable, the OSCA officials should be apprised of the issues. If the officials decide to recommend to the Governors' Committee that such an interpretation be issued by the Board, a draft Board memorandum should be prepared. The memorandum should state the issue involved and the reasons why the present status of the Regulation is inadequate to resolve the issue, and should suggest an approach to be taken in an official Board interpretation. This memorandum need not be accompanied by draft *Federal Register* material. If the Governors' Committee determines that an interpretation is necessary, the Board memorandum and *Federal Register* material will be prepared.

All official Board interpretations, except those which clearly deal with noncontroversial or technical issues, will be published for comment in the *Federal Register* before being issued in final form. See Attachment C for an example.

The *Federal Register* material for such interpretations should contain a docket number (issued by the Secretary's Office), a discussion of the substance of the interpretation and a statement that the interpretation is being issued for comment by the Board in order to assure an informed decision-making process. The comment period will be 30 days. The interpretation will become effective 60 days after issuance for comment (30 days after the close of the comment period) without further action by the Board, unless significant comments have been received. If such comments have been received, the section staff and OSCA officials will make recommendations to the OSCA Governors' Committee as to what changes, if any, should be made.

If the interpretation remains unchanged a *Federal Register* notice should be published, before the original effective date, which discusses the comments and states the Board's reasons for issuing the interpretation in final form as it was originally proposed. This notice would require Board action, usually on the consent calendar.

If the comments indicate and OSCA staff agree that the interpretation should be changed, a Board memorandum and *Federal Register* material outlining the changes and the reasons therefor should be prepared in advance of the original effective date and submitted through the OSCA Governors' Committee to the Board for approval. If the Board cannot act on the proposal before the original effective date, a notice postponing the effective date until further notice should be published in the Register (see p. 43 of FR *Document Drafting Handbook* for example). The interpretation will then be issued in final form in the *Register*. In most cases, the effective date should be delayed 30 days, but the delay can be waived in certain cases (5 U.S.C. § 553(d)).

2. Official staff interpretations will be issued in response to requests which require clarification of technical ambiguities in the Regulation or which have no significant policy implications. They are expected to be the bulk of the responses made by OSCA to requests for interpretation, and will generally cover, with some restriction, the same range of issues as the present Public Information Letters. They will be published in the *Federal Register*, with identifying details deleted, although such identification can be obtained through the Board's Public Information Office.

The staff member to whom the request has been assigned will decide, in conjunction with the Section

Chief, if the request should be answered with an official staff interpretation. If so, the letter will be drafted. Each letter should contain a complete recitation of the facts as they were presented in the request, and a statement that the response is based on only those facts. The letter should be approved by section level personnel and forwarded to (1) a designated official of OSCA who will approve and *initial* the interpretation, *and* (2) to the designated official who will both sign the letter and initial it. Each letter will be initialed by two OSCA officials.

Every official staff interpretation must contain the following statement denoting its status:

> This letter is an official staff interpretation of Regulation B(Z), issued, in accordance with § 202.13(c)(3) (§ 226.1(d)(3)) of the Regulation.

In most cases, the letter will be sent after it is signed to the person making the request, and a copy will be sent to the *Federal Register* for publication. The *Federal Register* material should be prepared as a rules document (see p. 12 of *Document Drafting Handbook* and Attachment C for an example), but without an explanatory preamble or a docket number (except when issued for comment). Each letter should have a short explanatory headnote (no more than two sentences).

Staff is encouraged to publish two or more staff interpretations within the same notice to avoid duplication of resources. The effective date does not need to be delayed as these interpretations are subject to the exception in 5 U.S.C. § 553(d) for interpretative rules. Staff interpretations should be numbered consecutively in the following manner: *Regulation B—12 CFR*

Part 202, EC-0001; Regulation Z—12 CFR Part 226, FC-0001.

Certain official staff interpretations will be published for comment prior to their effective date. When a request for interpretation poses a novel or controversial question which is not of sufficient importance to warrant a Board interpretation but would be subject to differing views by interested parties, the interpretation should be published for comment in the *Register*. The inquiring party should be notified that the interpretation is being published for comment before being issued in final form. The procedures to be followed for such publication are identical to those used for official Board interpretations (see page 4), except that the staff interpretation will be written as a letter response to a request and will be approved by two OSCA officials. Comments received on the proposal will be reviewed by staff, and OSCA officials will approve the final form of the interpretation.

The OSCA Governors' Committee will review all official staff interpretations on a quarterly basis and each section chief will be responsible for providing the Director of OSCA with a complete reading file of official staff interpretations, normally within 15 days after the end of the quarter.

3. *Unofficial staff interpretations* will be issued by OSCA staff in those cases where the protection of the Act is neither requested nor required or where a speedy response is required. These letters will usually be issued in the following cases:

1. The question has been satisfactorily answered in the past by an official letter or by a Public Information Letter, which has not been given

official status and which does not warrant such status.
2. The request involves narrow issues that do not affect a significant number of creditors.
3. The person making the request requires a rapid response.
4. The person making the request does not seek the Act's protection.
5. The request for official staff (or Board) interpretation is answered in the negative.

The staff member, in conjunction with the section chief, will determine that a request should be answered with an unofficial interpretation. The letter will be drafted, approved and signed by the section chief or the staff member. Each letter which responds to a request for an official interpretation should contain an explanation of the reasons why an unofficial interpretation has been issued instead. Generally, the reasons for denial can be couched in the language of the Regulation (see § 202.13(c)(4) and § 226.1(d)(4)).

Every unofficial staff interpretation must contain the following statement denoting its status:

> This is an unofficial staff interpretation of Regulation B(Z).

Unofficial interpretations will be sent to the person making the request and will, if the material contained in the letter is of sufficient interest, become part of the Public Information file.

4. *Reconsideration of official staff interpretations* by the Board may occur upon request of interested parties. Requests for reconsideration must be made

within 30 days of final publication in the *Register* and will be addressed to the Secretary of the Board. The request for reconsideration must be granted or denied within 15 days of receipt or an acknowledgement sent which sets a reasonable time within which a response will be given. OSCA staff of the relevant section and officials will study the request and make an independent recommendation to the OSCA Governor's Committee. The person who made the original request for interpretation, if different from the person requesting reconsideration, should be contacted informally concerning the request for reconsideration, and an opportunity given to that person to comment upon it prior to the Committee's decision. The Committee will decide whether or not to grant the request for reconsideration.

If the request is denied, a response, signed by the Secretary and drafted by OSCA staff, which states the reasons for the denial, will be sent to the person making the request.

If the request for reconsideration by the Board is granted, staff will prepare a Board memorandum. If the Board determines that the staff interpretation should remain unchanged, the person making the request will be so notified by a letter from the Secretary which has been drafted by OSCA staff. If a decision is made by the Board that the interpretation should be changed, the new interpretation will be drafted by OSCA staff. signed and initialed by OSCA officials and should be published in the *Federal Register,* with a notice which rescinds the previously issued interpretation. The person who made the original request for interpretation should be notified by OSCA officials of the action taken.

Service of the within and receipt of a copy thereof is hereby admitted this .... day of November, A.D. 1979.